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Director's Decisions for California

Grazing

1950-1969

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DISTRICT LAND OFFIC
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UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
Washington 25, D.C.

JULY 3 HOUR

DECISION

Oliver Cramton :
Appellant : Decision of the Hearing Examiner vacated and case remanded.

J. W. D. Patch and anc., :
Interveners :

Oliver Cramton has appealed from the decision of the Examiner, dated May 26, 1949, which modified the decisions of the Range Manager of March 7, 1947 and January 29, 1948.

In 1946 appellant applied for a license or permit to graze 750 cattle from April 1, 1947 to October 31, 1947 which was approved by the Range Manager's decision of March 7, 1947 for 457 cattle, April 1, 1947 to October 31, 1947 (Coyote Range) in common with the Intervener R. B. McCulley and 143 cattle April 1, 1947 to October 31, 1947 (Juniper County) and rejected as to 150 cattle because of lack of priority and insufficient range. Subsequently on December 3, 1947 appellant applied for a license or permit to graze 750 cattle from April 1, 1948 to August 15, 1948 and 590 cattle from August 16, 1948 to October 31, 1948 on the identical Federal range which was approved by the Range Manager's decision of January 29, 1948 for 485 cattle from April 1, 1948 to October 31, 1948 and rejected as to 265 cattle because of lack of dependency by use of the base properties.

The Examiner held that the base properties of L. B. and L. A. McCulley which were acquired by Cramton in 1944 and upon which the licenses were issued lost their attribute of dependency by use in excess of 2,000 sheep or 400 cattle because of long continued non-use, and modified the Range Manager's decisions of March 7, 1947 and January 29, 1948 accordingly.

A review of the record in this case indicates that the question of non-use is not the basic determining factor or material to the decision on this appeal, but that the fundamental issue to be determined is the dependency by use of the McCulley properties. Upon such determination depends the extent of the privileges that should be granted to appellant on the basis of such properties.

The McCulley lands consist of approximately 1660 acres of contiguous land in California and Nevada which produced an

average of 400 tons of alfalfa hay and 500 tons of grass hay during an average year. A commensurate property survey of these lands made in 1936 disclosed that those base properties produced 4225 AUM's of feed of which 2425 AUM's were fed to the McCulley range livestock when the Federal range was not usable and the balance of 1800 AUM's was either fed to other livestock, not grazed on the Federal range, or sold. The 2425 AUM's of forage fed to the McCulley livestock must be spread over the 5-month period when the livestock are off the Federal range and is sufficient to support 485 cattle per month during such period.

In 1935 the McCulleys were granted a license for 3000 sheep. This license appears to have been subsequently amended, apparently for the reason that they did not own 3000 sheep at that time. From 1936 to 1942 inclusive the McCulleys were generally licensed for 2000 sheep. In connection with their application for 1938 grazing privileges, the McCulleys filed a priority statement claiming that they had grazed during the priority period (1929-1934), 4000 sheep from 1929 to 1932 inclusive, and 3000 sheep from 1933 to 1934.

Section 161.2 (g) of the Federal Range Code which was in effect when the licenses involved in this case were adjudicated provides:

> " * * * The extent of the dependency by use of land shall shall be subject to the following:
>
> > (1) The dependency by use in no event shall exceed the average annual amount of forage that was customarily and properly utilized by the livestock operation during the priority period on that part of the public lands which, at the time of the issuance of the license or permit, is Federal range * * * ."

The licenses or permits issued to the McCulleys from 1936 to 1942 for 2000 sheep amounted to an average of 2880 AUM's and reflected fairly accurately the dependency by use of the base property, viz: 2425 AUM's as determined by the commensurate property survey of their lands made in 1936. It is true that the McCulleys claimed a priority of 4000 sheep, and that their base properties produced 4225 AUM's of feed, but since actually only 2425 AUM's were used to support their range livestock during the period when the Federal range was closed, that is the extent of the attribute of dependency

by use of their lands, and the granting of grazing privileges in excess of that amount would be and was erroneous. It is also true that when the attribute of dependency by use is established, it cannot thereafter be increased.

In 1942 the McCulleys disposed of their base properties to Balog Bros. who apparently thereafter, in 1944, conveyed the base properties to Oliver Cramton. No licenses or permits were issued on this base property during 1943 when, ostensibly, it was owned by Balog Bros.

In 1944 there was issued to Oliver Cramton on the basis of the McCulley lands, a permit or license for 728 cattle April 15 to October 31, and in 1945 and 1946, for 750 cattle April 1 to October 31. The grazing privileges thus granted far exceeded the dependency by use of the base lands as indicated by the 1936 range survey. From the Range Manager's action, in reducing the amount of the grazing privileges for the years 1947 to 1949 this appeal stems.

Mr. Cramton stated that prior to the time he purchased the McCulley base properties, he was advised by the grazing officials that the priority of the McCulley property was 4000 sheep, and that this full priority was still in effect. Mr. Cramton testified that District Grazier Kirk stated that no question had ever come up about the priority of the McCulley properties that there was a "4000 priority less two months on the forest reserve which would mean about 750 [cattle]." Also, that District Grazier Monte said the priority was 4000 sheep which "will figure out 800 cattle" (Tr. 31-32), and that in reliance of such statements he bought the ranch (Tr. 33) and that he would not "have paid the price I paid for it" if there were a question of priority involved. These statements, assuming they were made, completely overlooked the fact that although the McCulleys claimed a priority of 4000 sheep, the base property was only commensurable to the extent of 2425 AUM's for range livestock use when they were off the Federal range. These alleged statements probably related to the total forage production of the lands, viz; 4225 AUM's as stated above, but this did not constitute the commensurability of the base property.

The record also discloses that John Griswold, a grazing employee, made a range survey of the McCulleys' base properties in 1944, and by hand-written report, dated January 1945, stated

that the "priority varied ran from 3000 to 4000 sheep, one year 6000 sheep" and "probably take 5250 as average prior years." Mr. Cramton testified that after Mr. Griswold turned in his report, he was granted the "permit for 728 head" in 1944.

It is obvious that in granting this license no consideration whatever was given to the actual dependency by use rating of the McCulley lands but only to the total forage production without regard to its use during the priority period. The Griswold report agrees practically with the 1936 survey as to the total forage production, but the governing factor in granting privileges is the dependency by use of the base properties which the 1936 survey showed to be 2425 AUM's.

It should be noted that before the 1944 license was issued to Mr. Cramton, he was notified by letter, dated February 29, 1944, from District Grazier Kirk that

> "After reconsidering your application based on the recently purchased McCulley properties and changing the former operation from sheep to cattle, on a five to one basis, I believe that your demand for 700 head of livestock based on these properties is in excess of the prior use and the present use made of the federal range on the McCulley property.
>
> "I am approving your application for 600 head of cattle from the McCulley property * * * "

and for an additional 129 head on the basis of other properties.

However, notwithstanding this letter, the license issued to the Appellant on March 13, 1944 was for 728 cattle for $6\frac{1}{2}$ months' grazing use from the McCulley lands. There is no explanation in the record for the issuance of the permit for 728 cattle in view of the letter which stated that the application would be approved for 600 head of cattle from the McCulley property. The license issued to Mr. Cramton for 1945 privileges bore the notation "Temporary until survey is made to determine exact carrying capacity." Furthermore, the applications executed by Mr. Cramton for licenses for the years 1945 and 1946 carry the notation that they were "Temporary until survey is made to determine the exact carrying capacity."

It is apparent, therefore, that a final adjudication of the properties had not been made or would be made until the priority

Mr. Cramton if he qualifies for it. This, however, is not involved in the present case.

An appeal to the Secretary of the Interior may be made from this decision in accordance with 43 CFR 161.9 (m) and the Rules of Practice (43 CFR, Part 221). Notice of the appeal must be served upon adverse parties and filed in the Office of the Director of the Bureau of Land Management, Department of the Interior, Washington 25, D.C. within thirty days from the service of notice of this decision. Within twenty days after service of the notice of appeal, the appellant may file a brief, a copy of which must be served upon each other party in interest; and within twenty days after such service, such other parties in interest may file their briefs, copies of which must be served on the appellants. Briefs must be served within the same period of time allowed for their filing with the Director.

Marion Clawson

Director

RECEIVED
DISTRICT LAND OFFICE
SACRAMENTO, CALIF.
AUG 7 1950
HOUR

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
WASHINGTON

May 24, 1950

DECISION

Milton H. Gentry Appellant	:	Appeal from the decision of the Examiner
Beaver Valley Grazing Association Intervener	:	Affirmed

Mr. Gentry has appealed from the Examiner's decision of January 6, 1950 which held that on the basis of the dependency by use established from his base properties during the priority period (1929-1934) Mr. Gentry is entitled to receive Class I grazing privileges to the extent of 30 cattle.

The facts are sufficiently set forth in the Examiner's decision. The sole issue presented for determination is the extent of the dependency by use of Mr. Gentry's base properties during the priority years and the extent of the privileges that should be granted to him on the basis thereof.

Section 2 (g) of the Federal Range Code (43 CFR 161.2) provides that:

> "Land dependent by use means forage land which is of such character that the conduct of an economic livestock operation requires the use of the Federal range in connection with it and which, in the 5-year period immediately preceding June 28, 1934 (referred to in this part as the 'priority period'), was used as a part of an established, permanent, and continuing livestock operation for any two consecutive years or for any three years in connection with substantially the same part of the public domain, now part of the Federal range, * * * ."
>
> * * * * * * *
>
> "The extent of the dependency by use of land shall be subject to the following
>
> (1) The dependency by use in no event shall exceed the average annual amount of forage that was customarily and properly utilized by the livestock operation during the priority period on that part of the public lands which, at the time of the issuance of the license or permit, is Federal range."

Section 6 (c)(1) of the Code (43 CFR 161.6 (c)(1)) provides that:

> "No license or permit will be issued to any applicant unless he is able to show that he possesses adequate feed to support his licensed or permitted livestock during the period of time for which they are to be off the Federal range."

It is obvious, therefore, that grazing privileges are granted to the extent of the dependency by use (priority) of the base properties as limited by the productivity thereof, whichever is lower.

The record discloses that the dependency by use of the base properties during the priority period was lower than the commensurability or productivity thereof. Mr. Gentry's base properties consist of approximately 530 acres of land in T. 31 S., Rs. 6 and 7 W., and the record discloses that Mr. Gentry grazed 20 to 30 cattle on the Federal range from these base properties during the priority period. Therefore these properties are dependent by use to the extent of between 20 to 30 cattle. Mr. Gentry admits that that was the extent of his grazing during the priority period. (Tr. 18, p. 3, appellant's brief).

The present appeal is, in a sense, a continuation of Mr. Gentry's appeal from the Examiner's decision of February 17, 1947 which affirmed the district grazier's (now range manager) decision of February 21, 1946 which granted in part Mr. Gentry's application for a license or permit to graze 150 cattle, May 1 to October 31 and from November 1 to December 31, 1946. The application was granted for 64 cattle on the ground that the applicant's base properties were not commensurable for greater privileges. At the hearing before the Examiner on October 24, 1946 the stipulated issue was "Whether or not the average annual production of forage on the base properties of the appellant, that is customarily and properly utilized in his livestock operations qualifies him for grazing privileges in excess of those he was approved in the district grazier's notice of February 21, 1946." It was further stipulated by this Bureau " * * * that qualifications of the applicant insofar as his priority of use during the priority period is concerned, it is sufficient to cover any rating that is given on his base properties."

Mr. Gentry requested a rehearing, from the Examiner's decision of February 17, 1947, which this office treated as an

appeal, and in our decision of January 16, 1948 we remanded the case for further hearing to determine the extent of the grazing privileges to which Mr. Gentry may be entitled.

The Examiner, in his decision of January 6, 1950, from which the instant appeal stems, states that the stipulations entered into at the 1946 hearing were based on an erroneous interpretation of the Federal Range Code, and that grazing privileges are allocated on the basis of the dependency by use of the base lands during the priority period, or its commensurability or productivity, whichever is lower. This statement is correct. The pertinent portions of the code governing the issuance of grazing privileges have been set forth hereinabove.

We note that grazing privileges in excess of 30 cattle have heretofore been granted to Mr. Gentry. On the basis of the record such excessive privileges were issued erroneously. Mr. Gentry does not claim that such licenses or permits vested in him any absolute rights to such privileges. Nor do they, since the administrative officers of this Department can review, reconsider, and vacate a prior decision upon discovery it was erroneous. See *Earl C. Pressley* (A-24377), February 18, 1949.

There is nothing in the record to warrant a finding that Mr. Gentry's dependency by use of his base properties during the priority period was greater than 30 cattle. Under the Federal Range Code, privileges excess of this number cannot be granted for the reasons herein stated. The record sustains the Examiner's decision, which affirmed.

An appeal to the Secretary of the Interior may be made from this decision in accordance with 43 CFR 161.9 (m) and the Rules of Practice (43 CFR, Part 221). Notice of the appeal must be served upon adverse parties and filed in the Office of the Director of the Bureau of Land Management, Department of the Interior, Washington 25, D.C. within thirty days from the service of notice of this decision. Within twenty days after service of the notice of appeal, the appellant may file a brief, a copy of which must be served upon each other party in interest; and within twenty days after such service, such other parties in interest may file their briefs, copies of which must be served on the appellants. Briefs must be served within the same period of time allowed for their filing with the Director.

William Zimmerman, Jr.

Assistant Director

[illegible]

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
WASHINGTON 25, D. C.

[illegible]

DECISION

[illegible]

[illegible]

BAKER

Reversed by Sol's Dec. 3/21/57

A-27373

In reply refer to

Los Angeles 089305
087992, et al
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

April 2, 1956

Registered Mail
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DECISION

Sidney Lee Smith,
Appellant : Grazing Lease

Mary F. Kershner, et al. 1/ :
Appellees : Desert Land Applications
Homestead Application

Bureau Decision of February 21, 1956, Vacated in Part
Decision of Range Manager Reversed
Desert Land and Homestead Applications Held for Rejection

A decision for the Director, dated February 21, 1956, affirmed the decision of the Range Manager at Bakersfield, California, dated September 7, 1955, which cancelled portions of Mr. Sidney Lee Smith's grazing lease in T. 11N., R. 8 E., and T. 12 N., Rs. 7 and 8 E., S.B.M., California, on the ground that the lands had been classified as suitable for desert land and homestead entries. Mr. Smith has not to date filed an appeal to the Secretary of the Interior from the Bureau decision, and the last day in which an appeal from that decision can be timely filed is April 4. Due to recent Departmental interpretation with respect to the type of water rights required for desert land entries, the Bureau decision of February 21, is being reconsidered, on our own motion. 2/ The desert land and homestead applications, listed in Appendix "A", are before the Director in connection with such reconsideration of Mr. Smith's appeal.

1/ See Appendix "A" for a list of the desert land and homestead applicants.

2/ The Bureau decision of February 21, 1956, also affirmed the decision of the Manager of the Land Office at Los Angeles, California, dated December 30, 1954, which rejected portions of Mr. Smith's grazing lease that included lands classified for State Exchange under sec. 8 of the Taylor Grazing Act. That portion of the decision of February 21 is not being reconsidered, and will become final on April 5, 1956, in the absence of an appeal by Mr. Smith before that date.

The additional information which is the basis of the reconsideration of the decision is with respect to the interpretation of Section 1 of the Desert Land Act of March 3, 1877 (19 Stat. 377; 43 U.S.C., 1952 ed., sec. 321), which provides in part as follows:

> "*** it shall be lawful for any citizen of the United States *** to file a declaration *** that he intends to reclaim a tract of desert land *** by conducting water upon the same *** *Provided however* that the right to the use of water by the person so conducting the same *** shall depend upon bona fide prior appropriation ***."

Regulation 43 CFR 232.13 provides in pertinent part as follows:

> "No desert-land application will be allowed unless accompanied by evidence satisfactorily showing either that the intending entryman has already acquired by appropriation, purchase, or contract a right to the permanent use of sufficient water to irrigate and reclaim all of the irrigable portion of the land sought, or that he has initiated and prosecuted, as far as then possible, appropriate steps looking to the acquisition of such a right. *** All applications not accompanied by the evidence above indicated will be rejected."

Our attention has been directed to the decision of *Oma B. Davidson, et al.*, A-27251 (March 12, 1956), in which the Department of the Interior rejected a number of desert land applications in Arizona on the ground that "*** the doctrine of reasonable use adopted by the State of Arizona insofar as percolating waters are concerned, does not meet the requirement of the Desert Land Act that 'the right to the use of water *** shall depend upon bona fide prior appropriation.'" The decision cited as authority for the holding a Solicitor's Opinion, *Validity of Desert Land Applications and Entries in Arizona Dependent on Percolating Water for Reclamation*, 62 I.D. 49, 51 (1955). The cited Solicitor's Opinion states that the words "prior appropriation" as used in the Desert Land Act, *supra*, were used by Congress as words of art having a clear and precise meaning in reference to the rule of prior appropriation as "*** a well established doctrine of water law in the Western States and Territories at the time the Desert Land Act was passed ***." The Solicitor's Opinion concluded that whether a desert land entry in a particular state can be based upon percolating water depends upon whether under the law of that state (in that case, Arizona) percolating water is subject to the doctrine of prior appropriation.

The subject desert land applications refer to ground water as the source of water for the reclamation of the lands involved. Consequently, a determination must be made as to whether the applications satisfy the requirements of the Desert Land Act, supra, and appropriate regulations, quoted above, with respect to water rights.

The usual presumption in California pertaining to groundwater is stated in City of Pasadena v. City of Alhambra et al., 180 P. (2d) 699, 720 (District Court of Appeal, Cal., 1947): 3/

> "From the foregoing it is apparent that ground water which may not be classed as a subterranean stream must be classed as percolating water. *** /ground water/ is presumed to be percolating water and consequently the burden of proof is upon the party asserting to the contrary. *** To satisfy this burden the boundary of the subterranean body of water must be located with considerable certainty."

None of the applications contain any indication that the proposed water source is anything other than percolating water, and the field report does not indicate the presence of any definite underground channel. 4/

3/ The decision was affirmed as modified, 33 Cal. (2d) 908, 207 P. (2d) 17 (1949), with the above quoted ruling not involved in the appeal. See also 109 A.L.R. 395; 26 Cal. Jur. 266.

4/ The Water Code of the State of California provides for the appropriation of water in "*** subterranean streams flowing through known and definite channels." Deerings California Codes (1954), Water Code Annotated, sec. 1200. Moreover, it is provided that "No right to appropriate or use water subject to appropriation shall be initiated or acquired except upon compliance with the provisions of this division." Code, supra, sec. 1225. The requirements of the division include the filing of an application for a permit to appropriate water, the granting of a permit, authorized diversion as required, and the issuance of a license which confirms the right to the use of the water so appropriated. Therefore, even had the desert land applicants shown satisfactory evidence that the available water is that of a subterranean stream flowing through a known and definite channel, their applications would be subject to rejection for failure to furnish evidence showing the acquisition or steps toward the acquisition of an appropriative right under the Water Code to use such water. 43 CFR 232.13.

Since the presumption and available evidence indicate that the subject waters are percolating, our main concern is with the provisions of California law with respect to such percolating waters.

Percolating waters are not included in the permit and licensing provisions of the Water Code. Deerings California Codes (1954), Water Code Annotated, sec. 1200; *City of Pasadena* v. *City of Alhambra et al.*, 33 Cal. (2d) 908, 207 P. (2d) 17 (1949). In California since the leading case of *Katz* v. *Walkinshaw*, 141 Cal. 116, 70 Pac. 663, 74 Pac. 766 (1902), the rule of reasonable use of correlative rights has been applied in reference to percolating waters. A later case described such rights in the following language:

> "With regard to such landowners, these cases hold that each owner of land overlying the same general underground supply of water may take such water on his own land for any beneficial use thereon, so long as such taking works no unreasonable injury to other land overlying such waters; that if the natural supply is not sufficient for all such owners, each is entitled only to his reasonable proportion of the whole, and that each may apply to the courts to restrain and injurious and unreasonable taking by another, and to have the respective rights adjudicated and the use regulated so as to prevent unnecessary injury and restrict each to his reasonable share." *City of San Bernardino* v. *City of Riverside, et al.*, 186 Cal. 7, 198 Pac. 784, 788 (1921).

The right of overlying landowners to percolating waters is not acquired by compliance with the laws relating to appropriation, including priority of diversion and use, but is acquired by ownership of land; it is not a right to a definite quantity of water, but is only a correlative right subject to reduction if its use is unreasonably injurious to the uses of other overlying landowners, even though the others' use may be subsequent; and the right of each overlying landowner is subject to proportionate reduction in case of a shortage of the natural supply. In basic respects, therefore, the correlative right differs from the established water law doctrine of "prior appropriation," and cannot qualify as a water right within the meaning of the Desert Land Act, *supra*. See *Validity of Desert Land Applications*, *supra*, at 53, 54.

The above conclusion disposes of the major issue here involved. However, two additional points need consideration. Percolating waters can be appropriated to the extent set out in *City of Pasadena* v. *City of Alhambra*, *et. al.*, 33 Cal. (2d) 908, 207 P. (2d) 17, at 28, 29:

> "Any water not needed for the reasonable beneficial uses of those having prior rights is excess or surplus water. In California surplus water may rightfully be appropriated on privately owned land for nonoverlying uses. *** Proper overlying use, however, is paramount, and the right of an appropriator, being limited to the amount of the surplus, must yield to that of the overlying land owner in the event of a shortage, unless the appropriator has gained prescriptive rights through the taking of nonsurplus water."

Since the correlative right of the overlying owner does not qualify as a water right within the meaning of the Desert Land Act, supra, and since the right of appropriation of surplus percolating water is subordinate to the correlative right, such appropriative right could not qualify.

There is no claim in the subject cases of prescriptive rights to the water. Such rights arise as stated in the Pasadena case, supra, at 29:

> "Accordingly, an appropriative taking of water which is not surplus is wrongful and may ripen into a prescriptive right where the use is actual, open and notorious, hostile and adverse to the original owner, continuous and uninterrupted for the statutory period of five years, and under claim of right."

Such a right has been neither claimed nor proved in any of the subject cases. In any event, appropriative taking of water on public domain without authority of law would be in trespass against the government and could not ripen into a prescriptive right.

Consequently, the desert land applications are not supported by evidence of a water right as required by the Desert Land Act, supra, and 43 CFR 232.13 quoted above, and must be rejected. Oma B. Davidson, et al., supra.

In reference to the one homestead application here involved, it is noted that a homestead application for land desert in character, must also be supported by evidence of a water right. 43 CFR 296.4. In addition, reconsideration of the homestead application revealed that only a small part of the land applied for lies within the roughly designated zone of influence of the Mojave River drainage area, and that only on the outer fringe. The field examination report discloses that lands clearly within the designated zone of influence in the subject subsidiary basin are of doubtful value for agricultural development, since even were water obtainable it would be from deep wells with comparatively small yields, the recharge would be very low, and the quality of the water would be poor to doubtful. Wells drilled outside the designated area are clearly not adequate for irrigation purposes. The applicant gave no properly supported evidence that water is available, but merely stated that there is water at the depth of from 100 to 200 feet, and that he would obtain such water from deep wells. Consequently, there is not sufficient evidence to justify classification of the land as suitable for homestead entry. See 43 CFR 296.4.

The conclusions reached above that the subject desert land and homestead applications must be rejected, make unnecessary the cancellation of Mr. Smith's grazing lease in conflict therewith.

Accordingly, the Bureau decision of February 21, 1956, is vacated, insofar as it affirmed the decision of the Range Manager, dated September 7, 1955. The decision of the Range Manager, dated September 7, 1955, which cancelled Mr. Smith's grazing lease as to the extent of its conflict with the land classified for desert land and homestead entries, is reversed.

Although the Director has delegated to field officials authority to reject desert land and homestead applications, the Director may in his discretion take such action directly. The Desert land and homestead applications which are before the Director in connection with Mr. Smith's appeal, and which are listed in Appendix "A", have been considered on their merits, and are hereby held for rejection, for the reasons set out above.

This decision is subject for 30 days to the right of appeal to the Secretary of the Interior. If an appeal is filed, it must conform to the provisions of 43 CFR 221.75 and 221.76. See Circular No. 1818, attached. If an appeal is filed by any of the desert land or homestead applicants, Mr. Sidney Lee Smith should be considered an adverse party within the meaning of the above regulations; or if Mr. Smith files an appeal the homestead and desert land applicants should be considered adverse parties.

(signed) DEPUE FALCK

Acting Director

Attachments 2

DISTRIBUTION:
To all applicants (Registered Mail)
Mr. Sidney Lee Smith (Registered Mail)
State of California (Regular Mail)
Each AO (3); Each SO (3); Each LO (3); Alaska OS;
Area Counsel (Anchorage)2; L&M Officer (Anchorage) 2;
District Manager (Juneau) 2; Lands Staff Officer (2); Range Staff Officer (2);
Each Case File: BLM Reading File; Attorneys' Reading File: FSRD; Au (25);
GST

APPENDIX "A"

Serial No.	Name	Type of Application	Township & Range
L.A. 087992	Mary F. Kershner	Desert Land	12 N., R. 8 E.
" 087993	Cora L. Kershner	"	12 N., R. 8 E.
" 087994	Helen K. Macy	"	12 N., R. 8 E.
" 091082	Rex Warnix	"	12 N., R. 7 E.
" 091154	Bertha H. Himes	"	12 N., R. 7 E.
" 091155	Isaac A. Himes	"	12 N., R. 7 E.
" 091345	George F. Begnell	Homestead	12 N., R. 7 E.
" 093405	Ruby E. Huffman	Desert Land	11 N., R. 8 E.
" 095497	William J. Hope	"	11 N., R. 8 E.
" 095530	Wayne P. Scott	"	11 N., R. 8 E.
" 095882	John M. Bedgood	"	11 N., R. 8 E.
" 093406	Francis Torres	"	11 N., R. 8 E.
" 093407	Beulah Mae Choquette	"	11 N., R. 8 E.
" 093720	Augustus W. Crawford	"	11 N., R. 8 E.
" 093721	William D. Reynolds	"	11 N., R. 8 E.
" 093869	William F. O'Donnell	"	11 N., R. 8 E.
" 093872	Alta B. Spaulding	"	11 N., R. 8 E.
" 095372	Oliver Hawthorne	"	11 N., R. 8 E.
" 095388	Bill W. Hawthorne	"	11 N., R. 8 E.
" 095471	Bert E. Smee	"	12 N., R. 8 E.
" 095484	Sidney Lee Smith	"	12 N., R. 8 E.
" 095496	Dolores R. Hope	"	11 N., R. 8 E.
" 0105740	Theodore T. Inouye	"	12 N., R. 8 E.
" 0105822	Janet M. Lacki	"	12 N., R. 7 E.
" 0106137	Casimir Dabrowski	"	12 N., R. 7 E.

no appeal taken.

In reply refer to:

Los Angeles 053112
0107626
0109491
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

Registered Mail
Return Receipt Requested

DECISION

January 29, 1957.

Ray Eyherabide
Appellant

John C. Tarr
Public Sale Applicant

Tarr & McComb Corp.
Public Sale Applicant

Grazing Lease

Decision of Manager Affirmed

Ray Eyherabide, through his attorney, has appealed to this office from decisions of the Manager of the Land Office, Los Angeles, California, dated May 10, 1954 and April 6, 1955, wherein his section 15 grazing lease Los Angeles 053112 was cancelled in part. The actions taken by the Manager were predicated upon a classification of the land as suitable for public sale pursuant to Section 2455, Revised Statutes. (43 U.S.C., 1952 ed., 1171) as amended.

In substance the appellant contends (1) that the land lies within the land holding of the Eyherabides and that they have used the land for grazing for the past 30 years; (2) that they need the land for spring pasture; (3) that he purchased adjoining deeded lands in order to secure a Sec. 15 lease on certain of the subject public lands; and (4) that the land is not close to good roads and is not suitable for residences and that the land is primarily adapted to grazing.

On October 22, 1953 Tarr and McComb Corporation filed public sale application, Los Angeles 0107626, for lands described as Sec. 24, T. 10N., R. 15W., S.B.M. California and on January 22, 1954, John C. Tarr filed public sale application Los Angeles 0109491 for the E½ Sec. 30, T. 10N., R. 14W., S.B.M. California. The record shows that the lands described consist of two isolated tracts and comprise a part of grazing lease Los Angeles 053112 of the appellant, Ray Eyherabide. The lands were examined in January and March of 1954. The report of field examination indicates that the land is not susceptible of efficient management by this Bureau, and that neither of the tracts contain any springs or other characteristics that make them valuable for retention in public ownership. The lands were classified as primarily valuable for grazing and suitable for disposal by public sale. By supplemental report of July 19, 1956, the State Supervisor states that further field investigation of the matter reveals that there is no evidence of any improvements placed on the land by the grazing lessee and no evidence that the sale of the land will have an adverse economic effect on the lessee's operations.

The land under application was withdrawn from settlement, location, sale, or entry and reserved for classification by Executive Order No. 6910. The land is subject to disposal if it is classified under the provisions of an applicable public land law in accordance with its most suitable and appropriate use. Cf. William John Mauro, A-27318 (July 13, 1956); (43 CFR 296.1). Section 7 of the Taylor Grazing Act, as amended (43 U.S.C. 1952 ed., sec. 315f) and regulations thereunder, 43 CFR 160.12 specifically provide that lands embraced in a grazing lease are subject to classification and disposition under the provisions of the public land laws. The Department has held that a grazing lease is properly cancelled as to lands included in a public sale application where the land is not susceptible of efficient management by this Bureau and where sale will not result in any undue interference with the grazing lessee's livestock operations. Thomas Connolly, A-26676 (May 1, 1953).

As pointed out above, the isolated tracts in question are not susceptible of efficient management by this Bureau. The appellant states that he needs the land for pasture to finish his lambs in the spring of each year, that he has used the land for 30 years, and that he purchased adjoining land in order to secure a Section 15 lease on certain of the subject public lands. These assertions are not persuasive on whether the partial cancellation of his grazing lease as a result of the disposal of these two tracts by public sale will create a hardship or interfere unduly with his livestock operations. Field investigation indicates that disposal of the land would not have an undue adverse effect on his grazing operations. Moreover, appellant states that he owns land adjoining each tract applied for, and that he desires to be notified of the sale, if it is held, so that he may bid for the land. As an owner of adjoining land he could qualify as a preference right bidder (43 CFR 250.11 (b)).

The Department has held that a person who challenges a classification must show in what respects the adverse classification is in error. In the absence of error in the classification, appearing on the face of the record, an appellant must show by positive and substantial evidence that the classification is erroneous. Cf. Mary Refugio Jackson et al, A-27236 (February 29, 1956); Harry E. Anderson, A-27313 (June 14, 1956).

After careful consideration of the facts in this case, we do not find there is any error on the face of the record, nor do any of the statements made by the appellant convince us of any error in the classification of the land involved as suitable for disposal by public sale.

Therefore, the decision of the Manager is affirmed.

The right of appeal to the Secretary of the Interior is allowed. If such appeal is taken, it must be received in this office within 30 days from notice hereof and must be accompanied by a $5.00 filing fee. Strict compliance must be made with 43 CFR Sections 221.31 to 221.35, inclusive, and other pertinent sections of the Rules of Practice, Circular 1950, effective May 1, 1956, as amended by Circular 1962, effective October 4, 1956. See Information Sheet attached.

In the event an appeal is taken from this decision, the adverse parties to be served with notice thereof are: John C. Tarr, 2849 Olive Street, Huntington Park, California and Tarr & McComb Corp., 126 West Third Street, Los Angeles13, California.

For the Director:
A. H. Zerr

Attachment

DISTRIBUTION:
Stephen Eyherabide (Registered Mail)
Ray Eyherabide (Regular Mail)
John C. Tarr (Regular Mail)
Tarr & McComb Corporation (Regular Mail)
Lands Staff Officer
Appeals List No. 1
CFG

Lud. 3

Route		Initial	Date
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5.04d

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

July 30, 1957

Certified Mail
Return Receipt Requested

DECISION

G. E. (Earl) McCline, :
appellant :

Examiner's Decision Reversed

An appeal has been filed by Mr. Earl McCline, hereinafter referred to as the appellant, with the Director of the Bureau of Land Management from a decision of the Hearing Examiner dated November 18, 1955.

The Examiner in his decision ruled that 43 CFR 161.6(c)(9) of the Federal Range Code (1949 ed.) did not operate automatically and that the appellant's base property had not lost its dependency by use or priority by operation of that section of the Code, which reads:

> "In the event of failure for any two consecutive years either to offer a base property in an application for a license or permit, or to accept a license or permit offered pursuant to such an application, such base property will lose its dependency by use or priority."

The Examiner held, however, that the appellant's base property had lost its dependency by use or priority by virtue of 43 CFR 161.6(c)(10) of the Federal Range Code for Grazing Districts which provided:

> "The failure for any two consecutive years to make substantial use of the grazing privileges, authorized under an accepted license or permit, may result in the loss of the dependency by use or priority of the base property in proportion to the failure to use such license or permit." (Emphasis added.)

In line with this holding, the Examiner ruled that appellant's base property had lost its class 1 dependency and therefore was not entitled to further grazing privileges.

The decisive question before me at this time is whether the 10-year permit issued McCline in 1945 was effectively cancelled by the Bureau, or did it continue in effect until 1955? After reviewing the records, it is my conclusion, as it was the Examiner's, that the range manager failed in his attempt to cancel the appellant's 10-year permit.

The records show that the range manager failed to give proper notice to the appellant that his 10-year permit was being held for cancellation, nor was he given an opportunity to show cause why his permit should not be cancelled.

Section 161.11(d) of the Range Code is the section under which action should properly have been taken by the range manager to cancel the 10-year permit. Section 161.9(d) which the Examiner cited as the governing procedure to be followed does not apply in cases of this type. In this case the original 10-year permit was properly issued to the appellant and clearly does not come within the scope of section 161.9(d) which begins as follows:

> "Licenses or permits will be subject to cancellation to the extent that they have been improperly issued."

As the Bureau considered the 10-year permit to have been cancelled in 1948, no billing notices were thereafter sent to the appellant. The failure of the Bureau to bill the appellant in accordance with the provisions of the permit and the usual practice, resulted in the appellant's subsequent failure to pay the yearly rentals. This failure to pay the yearly rental, however, can in no way prejudice the validity of the appellant's 10-year permit as it was the Bureau's responsibility, not the appellant's, to give notice of the fees due under the terms of the permit. Both the Bureau and the appellant were lax in this respect as the appellant accepted without protest the Bureau's failure to send a billing. The greater negligence, however, was on the Bureau in not complying with its own regulations for cancelling the appellant's permit.

As the 10-year permit had not been properly cancelled, it was in force and effect during the period when no substantial use was made by the appellant or his lessee. The privileges which may have been attached to the appellant's property therefore, could not have been lost by the operation of section 161.6(c)(9).

The Hearing Examiner in his decision held that:

> "Even though, as has been concluded in this decision, the appellant was the holder of a valid 10-year permit, the range manager is justified in concluding that the base property lost its dependency by use or priority under the provisions of section 161.6(c)(10) of the Code."

I cannot agree with this conclusion. The regulation 161.6(c)(10) provided that failure to make substantial use may result in the loss of the dependency by use or priority of the base property. This section of the Federal Range Code is not self-executing, but requires an affirmative action by the Bureau in order to affect the status of grazing privileges. So long as the permit was valid and in force, the permittee was not required to file annual application for grazing privileges. It would be inequitable to penalize the appellant now, for failure to use his grazing privileges during the term of the permit when that failure was primarily and directly attributable to the Bureau's improper action purporting to cancel the permit.

The decision of the Examiner therefore is reversed, to the extent that it held that the range privileges of the appellant were lost by the operation of section 161.6(c)(10). The appellant's base property appears to be qualified for the amount of range privileges originally covered by the expired 10-year permit. If all else appears to be regular, the range manager is instructed to take further action on appellant's application for grazing privileges not inconsistent with this decision.

Edward Woozley
Director

Distribution:
G. E. (Earl) McCline, Frenchglen, Oregon, CRR
Pat H. Donegan (atty), Wiburn Building, Burns, Oregon, CRR

Otto Aho, 1495 Wells Avenue, Reno, Nevada (2)
Hearing Examiner Dalby, Salt Lake City, Utah (3)
Range Manager Howard DeLano, Box 713, Burns, Oregon
Joseph H. Tudor, Office of the Solicitor, Washington (5)
Regional Solicitors, Areas 1, 2 and 3 (2 each)
Area Administrators, Areas 1, 2 and 3 (3 each)

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	Wyoming	7

In reply refer to:

Los Angeles [illegible]
[illegible]

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

[illegible]

DECISION

Vern L. Dye :
et al., Appellants : Grazing Lease

District Range
[illegible]
[illegible]

Vern L. Dye and H. H. [illegible] have appealed to the Director of the Bureau of Land Management from the decision of the District Range [illegible] of Bakersfield, California, dated February 8, [illegible], which cancelled in part grazing lease [illegible]. This action was a result of the classification of a portion of the land [illegible] within that lease as suitable for agricultural [illegible] the desert land act [illegible] applications for entry on this land have been filed by [illegible] et al., whose names and addresses are listed in Appendix "A".

The appellants do not question the authority to cancel lease [illegible] upon the proper classification of the land as suitable for agricultural [illegible]. They contend, however, that the land involved is not suitable for agriculture [illegible] and that it is of a [illegible] and subject to considerable movement of sand [illegible] by frequent winds.

The attorney for the appellants, when he [illegible] the appeal, stated that "we will shortly forward [illegible] information by way of soil analysis reports on the land in question." There is nothing in the record to indicate that this additional information was ever received.

The propriety of the cancellation of the appellants' grazing lease [illegible] requires a [illegible] of [illegible] whether [illegible] the land was properly classified.

In reply refer to:

Los Angeles 069212
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

April 29, 1958

DECISION

Vern V. Cyr :
A. H. McKnight : Grazing Lease

District Range
Manager's Decision Modified
Cases Remanded

Vern V. Cyr and A. H. McKnight have appealed to the Director of the Bureau of Land Management from the decision of the District Range Manager for this Bureau at Bakersfield, California, dated February 2, 1956, which cancelled in part grazing lease Los Angeles 069212. This action was a result of the classification of a portion of the land encompassed within that lease as suitable for agricultural use under the Desert Land Act (43 U.S.C., 1952 ed., sec. 321 et seq.) Applications for entry on this land have been filed by Hazel M. Smith, and eight others, whose names and addresses are listed in Appendix "A".

The appellants do not question the authority to cancel their lease, upon the proper classification of the land as suitable for agricultural purposes; they contend, however, that the land involved is not suitable for agricultural use because of its rocky and sandy character. They also submit an affidavit by Thomas J. O'Sullivan who states that he is familiar with the property concerned, and that it is of a very rocky and sandy character and subject to considerable movement of sand covering by frequent winds.

The attorney for the appellants, when he transmitted the appeal, stated that "we will shortly forward to your office supplemental factual information by way of soil analysis reports of the land in question." There is nothing in the record to indicate that this additional information was ever received.

The propriety of the cancellation of the appellants' grazing lease necessarily requires a decision as to whether or not the land was properly classified.

The only evidence which has been presented to controvert the classification, other than the statements of the appellants, consists of the affidavit of Mr. O'Sullivan, whose experience and qualifications for expressing an authoritative opinion are not disclosed. A mere statement that the facts are not as represented in the classification is not sufficient to show in what respect the adverse classification is in error. Mary Refugio Jackson et al., A-27236 (February 29, 1956).

On the other hand, where the classification of land as suitable for desert land entry is unsupported by sufficient evidence in the report of the field investigation that the land is more valuable or suitable for that purpose than it is for the production of native grasses and forage plants, the classification cannot stand. Walter E. Scott, A-27293 (June 21, 1956).

The validity of the basis for the classification must therefore be considered.

The Mojave River Drainage Area Report, prepared in the field in 1954, deals with the agricultural possibilities of approximately 100,000 acres of land. The tracts here involved comprehend all of sections 10, 11, and 13, the west half of section 12, and the north halves of sections 14 and 15 of Township 11 North, Range 9 East, San Bernardino Meridian, California. They are located in Soda Lake Valley, the easternmost of seven ground water basins which are subsidiary to the Mojave Valley. This land is within the area believed by the field examiner to be influenced by the waters of the Mojave River. The boundaries of the zone of influence of these waters have been delineated on a map submitted with the report. 1/ With respect to land within this boundary, the field examiner states:

> "Practically all the irrigated lands in the area lie within it, and wells drilled within that boundary in the Mojave Valley can reasonably be expected to yield fair to good quantity and quality of irrigation water within feasible limits of pump lift. Within the boundary, but in the subsidiary basins outside of the Mojave Valley /of which Soda Valley is one/ sufficient water can probably be obtained from deep wells but the yields may be comparatively small, the quality poor to doubtful, the recharge very low, and the pump lifts generally over

---

1/ This information was apparently obtained from the California State Division of Water Resources Bulletin No. 47, dated 1934, which notes that the exact boundary of this area is open to question.

100 feet on the arable portions of the lands. In any event, it is expected that wells drilled outside the delineated boundary will not be adequate for irrigation purposes because of the low yields, prohibitive pump lifts, or both, and this is based on a knowledge of many unsuccessful wells, not on pure speculation."

In addition, wells in the subsidiary valleys were found to produce water containing a high percentage of sodium, and consequently of poor quality for irrigation, because of its tendency to disperse the soil, thereby causing a sealing or packing which reduces the rate of water infiltration.

In 1954, the only irrigation well in the immediate area of the tracts on which the applications for desert land entry have been made was located in Township 13 North, Range 9 East, S.B.M. This well pumped a maximum of 2,100 g.p.m., with 95 feet of drawdown. It was 400 feet deep, with water standing at 70 feet. An analysis of the water in this well showed it to have a high sodium content, which may render it unsuitable for irrigation purposes.

While there is in the report no finding as to the nature of the soil comprising the tracts in question, the character of the soil in nearby Crucero Valley is discussed, and found to be extremely sandy. Further, "the soils of the valley, as well as the water conditions there, become poorer as one goes east from Afton Canyon to Soda Lake." The soil on the broad alluvial slopes extending eastward from the lake playas in Soda Lake and Silver Lake Valleys is found to be relatively good; the tracts involved here, however, lie to the south of the Soda Lake playa. 2/

The field examiner concludes that regardless of the poor soil in these valleys, the fact that they overlie a probable source of groundwater for their irrigation is sufficient reason for opening these lands to agricultural entry. The general recommendation of the report is that "agricultural applications considered to be physically susceptible of cultivation be approved if they lie within the boundaries of the basins

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2/ The applicants for desert land entry have each submitted an affidavit by John M. Tollefson who, after identifying himself as the holder of a Master's Degree in Plant Physiology, and experienced in the field of plant physiology and soil chemistry in the arid and desert regions of California and Arizona, states that the soil on the tracts here involved is low in salt concentration and similar in chemical composition to other cultivated areas in the State of California.

* * * [believed] to be influenced by the waters of the Mojave River * * * [and that] agricultural entries embracing lands outside the * * * water basin boundaries be rejected regardless of soil characteristics on the basis that an adequate water supply is not available for their irrigation because of low yields, prohibitive pump lifts, or both."

This action was accordingly taken by the classifying authority, who warned, however:

> "It should be emphatically stated that even under the most favorable conditions, such as those found in the Mojave River Valley proper, the cost of exploration for water, adverse soils, the high cost of land development, and a previous history of agricultural failures on the marginal type lands encountered, provide conclusive evidence that efforts to reclaim such lands with a pumped water supply are more often destined for failure than success. In those valleys tributary to the Mojave Valley the prospects for successfully complying with the agricultural public land laws are even more remote, principally due to the greater uncertainty that adequate ground water can be developed. The allowance of entry on such lands is made because they are believed to meet the minimum requirements for agricultural classification, and not because this Bureau encourages the expenditure of time and money in efforts to reclaim them."

These serious doubts expressed by the classifying authority as to the possibility of reclaiming the land seem to justify questioning the classification. Numerous departmental decisions hold that the remoteness of the possibility of obtaining sufficient water to irrigate the land is a proper basis for rejecting an application, in view of the fact that the primary purpose of the Desert Land Act is to effect the reclamation of the land. *Victor Edwin Renaud*, A-25595 (February 14, 1949). More on point is the holding in *Arthur Eugene Woodard et al.*, A-25830 (May 2, 1950) to the effect that the mediocre soils and the great depth of water on the lands applied for, and the generally unfavorable history of irrigation development in the area, are proper reasons for rejecting an application for desert land entry.

There appears to be, therefore, a conflict between the recommended classification and the classification which the actual physical characteristics of the land seem to require. The chief difficulty in arriving at a conclusion as to the proper classification is the lack of a detailed report with respect to the particular tracts applied for.

Since the report on which the classifications are based covers an area of over 100,000 acres, it of necessity describes only in general terms the features of the areas recommended for allowance.

The Department has held that the tracts of land on which desert land entry is sought should be individually examined and classified where there is insufficient evidence in an area report regarding the suitability of the lands for agricultural development. *Charles C. Bogardus et al.*, A-27219 (November 23, 1955). Until the lands are classified on the basis of such an examination, the applications for entry may not be allowed.

Factors to be considered in the classification of the land include the experiences of other desert land entrymen, if any, in the area, and the existence of unappropriated water, within the meaning of the Desert Land Act, which could be used by the present applicants. The present regulations permit a grazing lessee to continue to use the land until a final decision adverse to him is taken. Cf. Volume IX, BLM Manual 2.2.100. No such final decision can be made until it has been determined that the applications may be allowed. Therefore, the cancellation of the grazing lease was, in the light of present regulations, premature, and is rescinded.

This decision relates only to the classification of the land involved, and to the rights of the grazing lessees. No action is taken with respect to the desert land applications, which remain to be adjudicated on their merits. An appeal by any of the desert land applicants from this decision would be premature; the applicants will have the right to appeal from any adverse action which may be taken by the Land Office Manager if the lands for which they have applied are not favorably classified. The grazing lessees, of course, will have the right to appeal if the Manager's action is adverse to them.

The cases are remanded to the Bureau's Assistant to the State Supervisor at Los Angeles for further action consistent with this decision.

For the Director:

A. H.

DISTRIBUTION:

Mr. Vern V. Cyr (Regular Mail)
Mr. A. H. McKnight (Regular Mail)
Mr. William J. Johnstone, Attorney (Regular Mail)
Desert Land Applicants listed in Appendix "A" (Regular Mail)
Lands Staff Officer (1)
Appeals List No. 1
MG

Appendix "A"

Serial Number	Name	Address
LA 097366	Hazel M. Smith	140 South Avenue., 57 Los Angeles 42, California
LA 097367	Frances G. Smith	13626 Kamloops Street Pacoima, California
LA 097368	James Leonard Smith	6002 Yearling Street Long Beach 11, California
LA 097369	Howard D. Smith	13626 Kamloops Street Pacoima, California
LA 097370	Jane A. Lewis	1042 Pacific Street, Apt. E. San Luis Obispo, California
LA 097371	Clifford Witty Worden, Jr.	2735 Spreckles Land Redondo Beach, California
LA 097372	Frances Eloise Grotthouse	134 South Avenue 57 Los Angeles 42, California
LA 097373	Sadie K. Davidson	5438 Monroe Los Angeles, California
LA 097374	John R. King, Jr.	153 N. Norton Avenue Los Angeles 4, California

file copy

OPC
Jl.

GRAZING PERMITS AND LICENSES (sec. 3) * 7 Base Property (Land)
* 14 Permits and Licenses

The extent to which a license or permit may be issued for Class 1 grazing privileges based upon dependency by use of land is governed by two factors: one, the priority established for the land during the priority period through the use made of the federal range by range livestock from the base property, and second, the commensurability or the grazing capacity of the property during the priority period. The lesser of these two factors limits the extent of the Class 1 qualifications of the base property.

Where the grazing capacity of the base property during the priority period was less than the priority established for the property, licenses or permits must not exceed the grazing capacity of the property at that time.

In the absence of a showing that the base property produced more forage during the priority period than recognized in the dependent property survey a livestock operator is not entitled to an increase in Class 1 grazing privileges beyond the number of livestock that could be supported upon the base property according to that survey.

Beverly P. Robinson, California Grazing District No. 1 (May 26, 1958)

copies sent to
plist C-1, C-2.

In reply refer to:

5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

May 26, 1958

Certified Mail
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DECISION

Beverly P. Robinson, : California Grazing District No. 1
Appellant :
:
Alexander and Alexander, :
Intervener :

Hearing Examiner's Decision Affirmed

Mr. Beverly P. Robinson has appealed to the Director of the Bureau of Land Management from the decision of the hearing examiner, dated February 29, 1956, which dismissed Mr. Robinson's appeal from the partial rejection of his application for grazing privileges for the 1954 grazing season in the Kern Unit of California Grazing District No. 1.

Since 1946 Mr. Robinson has been licensed to graze 125 cattle year long with 75% federal range use, the equivalent of 1, 125 animal unit months. By decision of December 30, 1953, the range manager (now district manager) notified Mr. Robinson that he would receive a license for the 1954 season for 76 cattle for 6 months 72% federal range use, the equivalent of 327 AUM's. This license issued and also a temporary non-renewable license for additional AUM's in order to allow Mr. Robinson time in which to adjust his livestock operation to the reduction imposed by the range manager.

The examiner found that Mr. Robinson was entitled to fewer grazing privileges than had been recognized by the range manager and dismissed his appeal, whereupon Mr. Robinson appealed to the Director.

There is indicated in the record some uncertainty as to the number of livestock that Mr. Robinson is entitled to graze on the federal range during the pendency of his appeal. Under the provisions of the Federal Range Code For Grazing District then in effect, an appeal suspends the effect of the decision. 43 CFR 161.9(k). As stated in the current revision of the Federal Range Code, effective January 22, 1956, (43 CFR, 1957 Supp., 161.10(i)(1)), an appeal suspends the effect of the decision from which it is taken pending final action on the appeal and the appellant may continue to graze his livestock in accordance with privileges licensed in the preceeding year, if the decision appealed from was not made immediately effective. Until final action has been taken on his appeal, Mr. Robinson is entitled to continue to graze the number of livestock for which he was licensed in the past.

The range manager reduced Mr. Robinson's licensed use of the federal range from 125 cattle to 76 cattle for 6 months (the equivalent of 57 cattle for 8 months) because he found that Mr. Robinson had been licensed on the federal range in excess of the grazing use of his livestock operation during the priority years (the five years immediately preceeding June 28, 1934). According to figures taken from a dependent property survey of Mr. Robinson's operation in April of 1939, his grazing use of the federal range during the priority period did not exceed 55 cattle and 2 horses.

Where land is base as in California Grazing District No. 1 the lands owned or controlled by a livestock operator are classified as either Class 1, i.e., "land dependent by use," or Class 2, i.e., "land dependent by location." Land dependent by use is forage land of such character that the conduct of an economic livestock operation requires the use of the federal range in connection with it and which, in the priority period, was used as a part of an established, permanent, and continuing livestock operation for any two consecutive years or for any three years of such priority period in connection with substantially the same part of the public domain, now part of the federal range. In the case of California Grazing District No. 1 (established April 8, 1935) the land must also have been offered as base property in an application for a license or permit prior to June 28, 1938, if it is to be considered as land dependent by use. Land that was not offered in an application for a license or permit prior to June 28, 1938, but which is so situated and of such character that it can properly be used as a base for an economic livestock operation utilizing the forage resources of the federal range is classified as land dependent by location. (Class 2)

To qualified livestock operators owning or controlling lands in Class 1 or Class 2 regular licenses or permits are issued in order of preference first to the extent of the dependency by use of the Class 1 lands and then for the number of livestock for which there is available federal range which can properly be grazed in connection with the use of the Class 2 lands.

Of all the lands owned or controlled by Mr. Robinson only the Home Ranch (land reference #1 in the 1939 dependent property survey) was offered as base property in an application for a license or permit prior to June 28, 1938, and only the Home Ranch may be considered as base property dependent by use. Milton H. Gentry, A-25968 (December 29, 1950); Don Emigh, A-23143 (November 29, 1941); Walter K. Ellis, 57 I.D. 113 (1940). Other lands owned by Mr. Robinson are considered as Class 2 lands but there is no forage on the federal range in the area of Mr. Robinson's operation above the amount needed to satisfy the Class I demand of all qualified operators in that area.

The extent to which Mr. Robinson may be granted a license or permit for Class 1 grazing privileges based upon the dependency by use of his Home Ranch is governed by two factors: one, the "priority" established for the ranch during the priority period through the use made of the federal range by range livestock from the ranch, and second, by the "commensurability" or the grazing capacity of the Home Ranch during the priority period. The lesser of these two factors limits the extent of the Class 1 qualifications of the Home Ranch." Milton H. Gentry, supra. The Federal Range Code for Grazing Districts currently provides (161.2(k)(3) that:.

> "(3)The extent to which grazing licenses or permits will be granted on the basis of dependency by use of land, shall be governed by the following:
>
> "(i) It shall not exceed the average annual amount of forage customarily and properly utilized by the livestock operation computed on the basis of any two consecutive years or any three years in which use was actually made during the priority period, whichever is more favorable to the applicant, on that part of the public land which, at the time of the issuance of the license or permit, is federal range.
>
> "(ii) It shall not exceed the amount of forage needed for the proper support of the number of livestock creating such dependency by use which is available on the base property during the minimum period established under sec. 4.
>
> "The grazing privileges which may be granted hereunder shall not exceed the amounts determined under subdivision (i) or (ii) of this subparagraph, which ever is the lesser . . .."

If during any two consecutive years or any three years of the priority period, whichever is the more favorable to Mr. Robinson 1/ (according to the 1939 survey the most favorable period would be the two years just preceeding June 28, 1934) his livestock utilized forage on the federal range for no more than 55 cattle and 2 horses, then his Class 1 grazing privileges can in no wise exceed that number of livestock or its equivalent in AUM's of forage unless through transfer he should acquire control of additional Class 1 base property. It was proper, therefore, to refuse to license Mr. Robinson to graze livestock on the federal range in excess of the equivalent of 55 cattle and 2 horses for 8 months.

1/ Although the cited provision of the Federal Range Code for Grazing Districts, 161.2(k)(3)(i), was not in effect when Mr. Robinson's application for grazing privileges was partially rejected, the provision is applicable in the adjudication of his future grazing privileges. Mahaffey Livestock, Inc., 64 I.D. 290 (1957)

The hearing examiner found, however, that Mr. Robinson was not entitled to priority grazing privileges in the amount recognized by the range manager. This finding was based upon information contained in the 1939 survey tending to show that Mr. Robinson's base property was not commensurate during the priority years for the number of livestock grazed on the federal range. In the 1939 survey the Home Ranch was rated as producing 75 AUM's of forage, which means that during the four months period in which the federal range is closed to grazing, Mr. Robinson's base property could properly support no more than 19 cattle. On the basis of this information the hearing examiner concluded that Mr. Robinson is entitled to Class 1 grazing privileges for the equivalent of 19 cattle for 8 months.

As Mr. Robinson has correctly pointed out, the record shows that after the 1939 survey he was issued yearly grazing licenses for a steadily increasing number of livestock until in 1943 he was licensed for 125 cattle. But the issuance of licenses for increasingly larger numbers of livestock does not mean that the 1939 survey showed Mr. Robinson to be entitled to graze more livestock on the federal range after that date than he could properly graze during the priority period. On the contrary, if the survey figures are correct as to the numbers of livestock grazed on the federal range and the forage produced on the Home Ranch during the priority years, the licenses issued to Mr. Robinson were far in excess of what he was entitled to, and a reduction in his authorized Class 1 grazing to the amount established during the priority period is required. George Carson and Sons, A-23584 (April 28, 1943).

If Mr. Robinson's base property (the Home Ranch) was commensurate for the equivalent of 19 cattle during the priority period then that is the extent of his Class 1 grazing privileges for the lesser of the two factors, priority and commensurability, governs the property's dependency by use. Although there is no direct evidence in the record as to the amount of forage produced on the Home Ranch during the priority period, there is nothing in the record to indicate that the 1939 dependent property survey is not the most accurate information on that factor available. Nor is it contended on Mr. Robinson's part, that the 1939 survey does not provide a fair representation of the amount of forage produced on the Home Ranch during that period. Testimony in the record by John W. Nicol, a witness for Mr. Robinson, would indicate that the Home Ranch produced very little forage during the priority years (Tr. 30). In the absence of a showing that the Home Ranch produced more forage during the priority period than recognized in the 1939 survey it is concluded that appellant is not entitled to Class 1 grazing privileges in excess of the amount determined by the hearing examiner. William Sellas, Fred Henroid et al., Interveners, A-25698 (June 15, 1950)

Since 1939, the productivity of the Home Ranch has increased considerably. According to a survey of Mr. Robinson's operation conducted in 1953 the Home Ranch (land reference #4 in that survey) was then producing 326 AUM's of forage which is substantially in excess of the forage required to support the livestock for which he may receive a Class 1 license or permit. 2/ The increased productivity on the Home Ranch does not serve to increase Mr. Robinson's Class 1 grazing privileges. William Sellas, Fred Henroid et al., Interveners, supra. Where a dependent property survey indicates that the current productivity of the base property is in excess of the priority or of the commensurability of the base property during the priority period, whichever was the limiting factor, the base property to the extent of such excess forage capacity, may be treated as dependent by location (Class 2) if so qualified, and entitled to share in any Class 2 Federal range forage that may be available for distribution. (43 CFR, 1957 Supp., 161.2(k)(3)).

To the extent that other lands of Mr. Robinson are unfenced and subject to management and control of this Bureau he may be entitled to an exchange of use license for the grazing of additional livestock based upon the forage produced on those lands. (See 161.6(c)).

Mr. Robinson has objected to the hearing examiner's recognition of Alexander and Alexander, through J. Glen Alexander, as the intervener in this case. Mr. Alexander appeared for the intervener without objection from Mr. Robinson at the hearing but did not otherwise take part in the proceedings. As a livestock operator in the Kern Unit Mr. Alexander has a proper interest in the extent of grazing privileges authorized in the unit and was entitled to enter his appearance if he desired. The objection is not timely and is considered to be without merit. The "saving clause" of the Federal Range Code cited by Mr. Robinson is inapplicable for the reason that none of the provisions of the Code have been applied retroactively to his prejudice. This determination of the extent of Mr. Robinson's Class 1 grazing privileges is based entirely upon the nature of his livestock operation as it existed during the priority period so far as this can be determined from the records that are available.

The decision of the hearing examiner is affirmed.

Mr. Robinson is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

2/ In 1953 the Home Ranch produced 65 tons of alfalfa equivalent to 260 AUM's of forage.

If an appeal is taken, then the adverse party to be served is:

J. Glen Alexander, Onyx, California

Edward Woozley
Director

Enclosure

DISTRIBUTION:

Mr. Beverly P. Robinson, (Certified Mail)
Mr. J. Glen Alexander, (Regular Mail)
Hon. Harlan Hagen
Hon. William F. Knowland
Hon. Thomas H. Kuchel
Range Staff Officer (8)
Appeals List No. 3
CCS

35615

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
WASHINGTON 25, D. C.

IN REPLY REFER TO:
6.05c
Sacramento
058125

DOCKET FILES

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NOV 23 1962

DECISION

G. J. Cummings

Appeal From Decision of
June 8, 1962

Notice of Appeal Filed
July 10, 1962

Appeal Dismissed

For the reason listed below your appeal to the Director, Bureau of Land Management, is hereby summarily dismissed (43 CFR 221.98):

☒ No statement of reasons has been filed in support of the appeal, and the time for filing the statement has expired (43 CFR 221.3).

☐ Your statement of reasons for your appeal (or your request for extension of time to file a statement of reasons) was filed in this office, but it was filed late. (43 CFR 221.3). The statement of reasons was transmitted to this office after expiration of the period allowed, and the delay in filing cannot be waived. (43 CFR 221.92(b)).

☐ You have not served the adverse party named in the decision appealed from with a copy of ☐ the notice of appeal, and/or ☐ the statement of reasons for the appeal, in the manner prescribed in 43 CFR 221.95. (43 CFR 221.4).

☐ Your appeal does not point out wherein the decision appealed from is believed to be in error and consequently you have failed to state reasons for the appeal, as required by the rules of practice. See Duncan Miller, 65 I.D. 292.

The dismissal of an appeal for failure to comply with the above requirements is mandatory. We have enclosed Form 4-1364 which contains the cited regulations.

You are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations contained in enclosed Form 4-1365. 1/ If you do not appeal we will close the case and return the record to our State Director for further appropriate action. If an appeal is taken the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations.

(Sgd.) Richard J. McCormick

~~Chief~~, Division of Appeals ~~Branch of Land Appeals~~
Division of Appeals

Enclosures 2

1/ The adverse party to be served is: None

See Page 2 for Distribution:

If an appeal is taken, then the adverse party to be served is:

J. Glen Alexander, Onyx, California

Director

Enclosure

DISTRIBUTION:

Mr. Beverly F. Robinson (Certified Mail)
Mr. J. Glen Alexander (Regular Mail)
Hon. Harlan Hagen
Hon. William F. Knowland
Hon. Thomas H. Kuchel
Range Staff Officer (8)
Appeals List No. 3
CCS

35615

DISTRIBUTION:

G. J. Cummings (Certified Mail)
SD (California)
LO (Sacramento)
Case File
Appeals Reading File
Permanent File
Division of Lands and Recreation
Binder
BRA

BDRF 1 & 2
6.03e HRAnderson : brf 11/23/62

In reply refer to:
Los Angeles 064531
099418, etc. 1/
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

June 24, 1958

Certified Mail
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DECISION

Ranch Development Corporation	:	Grazing Lease
Geana M. Christiansen et al.	:	Desert Land Applications

Cases Remanded

Clifford Ely of the Ranch Development Corporation, Hollywood, California, has appealed to the Director from a decision of the District Range Manager which canceled his sec. 15 grazing lease, Los Angeles 064531, in part because the lands had been classified as suitable for agricultural purposes.

Appellant alleges in substance that the soils and the waters underlying the lands are unfit for irrigated crop production, In support of his appeal appellant submitted results of tests of soil and water samples and other data pertaining to the lands developed by Leon J. Lapides, Ph.D., of the Redlands Chemical Laboratory.

The classification report is an area report prepared in 1953 and covers approximately 300,000 acres of lands in Chuckawalla Valley. In Charles C. Bogardus et al., A-27219 (November 23, 1955), the Department held that the report was too general to permit an informed determination, as to any specific tract or legal subdivision of the lands and the cases were remanded to the Director for an examination of each of the individual tracts under desert land application.

Accordingly, the decision of the District Range Manager in Los Angeles 064531 is hereby reversed and when this decision becomes final, the cases will be remanded to the Manager of the Land Office, Los Angeles, California, through the Assistant to the State Supervisor, Los Angeles, California, for further field examination of each of the tracts under desert land application and for reconsideration of the classification of the lands on the basis of such examination.

1/ The names of the desert land applicants and the land office serial numbers are listed on Appendix "A", attached.

Each of the parties listed in Appendix "A" is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations. If an appeal is taken by any of the parties listed in Appendix "A", then the adverse party to be served is: Clifford Ely, Ranch Development Corporation, 8228 Sunset Blvd., Suite 101, Hollywood 46, California.

Charles P. Mead
Acting Director

Enclosure

DISTRIBUTION:

Mr. Clifford Ely (Regular Mail)
Mr. Geana M. Christiansen (Certified Mail)
Mr. David W. Ball (Certified Mail)
Mr. Edwin Roy Hastings (Certified Mail)
Mr. Harvey E. Hastings (Certified Mail)
Mr. Ward C. Gordon (Certified Mail)
Mr. Stamatis G. Vasses (Certified Mail)
Mrs. Nellie H. Harvey (Certified Mail)
Mrs. Zelda H. Franklin (Certified Mail)
Mr. Earl Julian (Certified Mail)
Mr. Paul E. Richardson (Certified Mail)
Mrs. Rose McCune Petrarca (Certified Mail)
Mr. Mario Socrate Petrarca (Certified Mail)
Mr. Jack O. Dance (Certified Mail)
Mrs. Elise D. Dance (Certified Mail)
Mrs. Edith C. Orlean (Certified Mail)
Mr. Arthur M. Robinson (Certified Mail)
Mr. Lisle Jabez Adams (Certified Mail
Lands Staff Office
Appeals List No. 1
CFG

APPENDIX "A"

Name	Land Office Serial No. Los Angeles
Geana M. Christiansen	099418
David W. Ball	099424
Edwin Roy Hastings	099425
Harvey E. Hastings	099426
Ward C. Gordon	099487
Stamatis G. Vasses	099690
Nellie H. Harvey	099704
Zelda H. Franklin	099707
Earl Julian	099710
Paul E. Richardson	099711
Rose McCune Petrarca	0100148
Mario Socrate Petrarca	0100149
Jack O. Dance	0100356
Elise D. Dance	0100357
Edith C. Orlean	0100506
Arthur M. Robinson	0100660
Lisle Jabez Adams	0100797

[illegible] OF [illegible] and [illegible]

These topics are [illegible], [illegible] will be discussed.

Feb. 2: Burton et al., [illegible] ([illegible], and [illegible] ([illegible] 8, 1959)

LO (Sac)

RULES OF PRACTICE * 10 Standing to Appeal

Where issues are moot, appeals will be dismissed.

Bud O. Barnes et al., Sacramento 036951, 031355, and 043872 (March 2, 1959)

DEPT. OF INTERIOR
SACRAMENTO, CAL.
MAR 24 10 00 AM 1959
BUREAU OF
LAND MANAGEMENT
LAND OFFICE

In reply refer to:

Sacramento 036951
031355
043872
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

March 2, 1959

Certified Mail
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DECISION

Bud O. Barnes
Carl H. Holzhauser
John M. Perata

Grazing Lease (Sec. 15)

Appeals Dismissed

Appeals were filed by Mr. Bud O. Barnes and Mr. John M. Perata from separate decisions dated April 1, 1952, of the Regional Chief, Branch of Fire Control. The decisions appealed from dealt with conflicts in section 15, grazing lease applications, for certain lands applied for by the three above-named parties.

Leases issued by the Bureau as a result of the conflicting applications have been cancelled or have been transferred and allowed to expire by their own terms. The appeals filed by Mr. Barnes and Mr. Perata are accordingly dismissed for the reason that at this time no useful purpose would be served by deciding a now moot conflict.

Messrs. Barnes and Perata are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

If an appeal is taken by Mr. Bud O. Barnes, then the parties to be served are S. W. Richardson, Willits, California, who is the successor in interest to Mr. Perata, and Gilmore and Gilmore, attorneys for Mr. Holzhauser, Capital National Bank Building, Sacramento, California.

If an appeal is taken by S. W. Richardson, then the party to be served is Carl H. Holzhauser, Ukiah, California, whose attorneys are Burke & Rawles, Ukiah, California.

Edward Woozley
Director

Enclosure

DISTRIBUTION:

Mr. Bud O. Barnes (Regular Mail)
Burke & Rawles, Attorneys at Law (Certified Mail)
Mr. Carl F. Holzhauser (Regular Mail)
Gilmore and Gilmore, Attorneys at Law (Certified Mail)
Mr. S. W. Richardson, (Certified Mail)
Range Staff Officer
Appeals List No. 3
GRH

50991

If an appeal is taken by A. W. Richardson, then the party to be served is Carl E. Schumacher, Ukiah, California, whose attorneys are Burke & Rawles, Ukiah, California.

Director

Enclosure

DISTRIBUTION

Mr. Ted C. Warner (Regular Mail)
Burke & Rawles, Attorneys at Law (Certified Mail)
Mr. Carl E. Schumacher (Regular Mail)
Gibson and Gibson, Attorneys at Law (Certified Mail)
Mr. A. W. Richardson (Certified Mail)
Ukiah Field Officer
Appeals List No. 1
GAS

R&I
G.D.
3/5/62

GRAZING PERMITS AND LICENSES (Sec. 3) * 4 Appeals

* 9 Cancellation and Reduction

* 14 Permits & Licenses

The Director may by interim order place into immediate effect a decision made by the Hearing Examiner pending final decision on appeal to the Director, in accordance with 43 CFR 161.10(i)(2)(iii) and 161.6(e)(3). The purpose of the order is for conservation of the range in that no license or permit will be issued for grazing privilèges in excess of the grazing capacity of the area to be used.

State Director (California), appellant, Orlo G. Bailey et al., appellees, California No. 2-57-1 to 8, etc. (February 23, 1962)

Copy Sent to
C-1
C-2
3/5/62

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

In reply refer to:
6.05c

February 23, 1962

INTERIM ORDER

State Director (California),	:	California No. 2-57-1 to 8
Appellant	:	California No. 2-60-1
	:	California No. 2-60-3 to 8
Orlo G. Bailey et al. [1],	:	California No. 2-60-9 to 19
Appellees	:	California No. 2-60-20 to 39

In his decision of November 30, 1961, on the above case the Hearing Examiner, in his Concluding Determination No. (1), directed the District Manager as follows:

> "1. Impose a reduction of authorized Federal range use in the Willow Creek Unit of the Susanville Grazing District in order to conform the licensed and permitted use to the carrying capacity of the unit as shown by the appellants' 1960-1961 range survey modified in accordance with this decision."

The modification referred to by the Examiner in his decision served to adjust the findings of the appellants survey (27,704 animal unit months) by deducting the amount found necessary by the Bureau to support the existing wildlife (2,179 animal unit months) and by deducting the amount of forage that existed, at the time of survey, in the receded portions of Eagle Lake (1300 animal unit months). Accordingly, the forage available for livestock use within the Willow Creek Unit was determined by the Examiner to be to the extent of 24,225 animal unit months.

The appellant licensees and permittees did not appeal from the Examiner's decision; and, therefore, they are deemed to have accepted the Examiner's finding as the maximum or top limit of the present grazing capacity of the Willow Creek Unit. The State Director (California) has appealed to the Director, Bureau of Land Management, (43 CFR 161.10(g)) from the Examiner's decision contending the decision is in error in that, among other things, the grazing capacity of the Unit for livestock is considerably less than as determined by the Examiner, namely 24,225 AUM's.

---

[1] See distribution for names of other appellees.

The licensees and permittees have applied for grazing privileges in the Willow Creek Unit for the current grazing year.

In view of the provisions of Section 161.6(e)(3) of the Federal Range Code, and because the issues involved in the State Director's appeal are complex, a final decision will not be immediately forthcoming. Pending the issuance of such final decision on the appeal, I have determined that the orderly administration of the range and the public interest requires that the Examiner's finding as to the maximum grazing capacity of the Unit shall be placed in full force and effect. Accordingly:

> IT IS HEREBY ORDERED, Pursuant to the authority in 43 CFR 161.10(i)(2)(iii) and in conformity with 43 CFR 161.6(e)(3), the Examiner's decision, so far as it relates to Determination No. 1 and the grazing capacity of the Willow Creek Unit, is hereby placed in full force and effect pending final decision on the appeal of the State Director or until further order of the Director, Bureau of Land Management, or of the Secretary of the Interior.

The District Manager, in accordance with the above Interim Order, will impose a temporary percentage reduction of authorized Federal range use for the 1962 grazing season, and issue licenses not to exceed the maximum grazing capacity of the Unit as determined in the Examiner's decision of November 30, 1961.

Acting Director

Distribution on page 3

DISTRIBUTION:

Hon. Harold T. Johnson, House of Representatives
William O. Bradley, Attorney for Appellees (Certified Mail)
Joseph E. Taylor, Assistant Regional Solicitor (Regular Mail)
Orlo G. Bailey (Regular Mail)
W. T. Bailey (Regular Mail)
Charles W. Beckett (Regular Mail)
George A. Bantley (Regular Mail)
James N. Booth (Regular Mail)
Elwood O. Bradshaw (Regular Mail)
George E. Buckner, Sr. (Regular Mail)
John Capezzoli (Regular Mail)
Nancy Chappius (Regular Mail)
Velma C. Clark (Regular Mail)
John Cramer (Regular Mail)
Leroy Cramer (Regular Mail)
Josephine C. DeWitt (Regular Mail)
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H. T. French (Regular Mail)
Estate of John M. Hagata (Regular Mail)
Hansen Cattle Company (Regular Mail)
Catherine Ithurburn (Regular Mail)
Rees T. Jenkins Land
  and Livestock Company (Regular Mail)
Johnston Ranch (Regular Mail)
Estate of James W. Mapes (Regular Mail)
A. E. Martial, Jr. (Regular Mail)
Bernard J. McAllister (Regular Mail)
Ralph McAllister (Regular Mail)
Pierce & Esther McClelland (Regular Mail)
Herbert A. Miller (Regular Mail)
George H. Morgan (Regular Mail)
Neva Nuckolls (Regular Mail)
Orradre & Ochotorena (Regular Mail)
Pit River Ranch (Regular Mail)
Plemons & Sutherlin (Regular Mail)
Pressman & Rue (Regular Mail)
Robert R. Rodriquez (Regular Mail)
Estate of Willis C. Stone (Regular Mail)
Jack & Thomas Swickard (Regular Mail)
Millard Ulch (Regular Mail)
Frank & Leland Wood (Regular Mail)
F. E. Williams (Regular Mail)
Assistant Secretary Carver
Appeals List No. 3
Appeals Reading File
Attorneys' Reading File
JJS

GRAZING PERMITS AND LICENSES (Sec. 3) * 1 Generally

* 2 Adjudication

* 4 Appeals

* 6 Apportionment of Federal Range

* 7 Base Property

* 9 Cancellation and Reduction

Information used in the computation of carrying capacity of the Federal range obtained from data accummulated from areas of similar composition is generally acceptable in the absence of evidence to the contrary, but where there is evidence of a substantial nature to show that there is a variance between the usual and the conditions in a particular area, computations of carrying capacity should be based on studies made in that particular area.

Where at a hearing concerning base property qualifications, evidence is developed that the data used to determine the qualified demand on a grazing unit of the Federal range was obtained shortly after the Taylor Grazing Act went into effect, supplemented by information obtained from either estimates of the users or from fragmentary dependent property surveys, the case will be remanded for the purpose of conducting dependent property survey of the base property of all the users in the unit to properly determine the commensurability of such property.

State Director (California), Appellant, Orlo G. Bailey, et al., Appellees, California No. 2-57-1 to 8, etc.

In reply refer to:
6.05c
California 2-57-1
to 8, etc.

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

May 22, 1962

Certified Mail
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DECISION

California State Director,
Appellant

Orlo G. Bailey, et al.,
Appellees [1]

:

Susanville Grazing District
(California #2)
California No. 2-57-1 to 8
California No. 2-60-1
California No. 2-60-3 to 8
California No. 2-60-9 to 19
California No. 2-60-20 to 39
Section 3 Grazing

Decision of Hearing Examiner Affirmed as Modified

The Bureau's California State Director has appealed to the Director, Bureau of Land Management, from the decision of the Hearing Examiner dated November 30, 1961, which remanded the case to the District Manager with instructions to:

> "1. Impose a reduction of authorized Federal range use in the Willow Creek Unit of the Susanville Grazing District in order to conform the licensed and permitted use to the carrying capacity of the unit as shown by the appellants' 1960-1961 range survey modified in accordance with this decision.
>
> "2. Recompute the base property qualifications of those appellants who, under the district manager's decision, suffered a reduction of those base property qualifications."

The pertinent facts resulting in the hearing, held at Susanville, California, on March 7, 8 and 9, and concluded on June 20 and 21, 1961, are as follows:

> On April 2, 1957, separate appeals were filed by eight licensees from decisions of the District Manager of the Honey Lake Grazing District, dated February 26, 1957. No

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[1] See distribution for names of other appellees.

immediate action was taken on these appeals because the District Manager anticipated modifying his decisions which would render moot the issues raised. Thereafter, the District Manager issued decisions in February and March 1960, which superseded those from which the appeals were taken. With the exception of three appellants, the same parties filed separate appeals from the District Manager's later decision. Thirty-two other licensees or permittees also appealed.

The District Manager's 1957 decisions from which the first appeals were taken imposed a reduction in the licensed or permitted use of the Federal range in the Willow Creek Unit of the Susanville Grazing District. The reduction was based upon a study of the grazing capacity of the unit made by Bureau of Land Management employees in 1953. Because the District Manager became convinced that the forage survey was inaccurate, a new study was conducted in 1959 which formed the basis of his 1960 decisions. Those decisions imposed further substantial reductions of Federal range use which resulted in the second series of appeals.

The forage survey conducted by the Bureau included some of the licensees' and permittees' base properties which were intermingled with and of similar character to the surrounding Federal range. The survey of these privately-owned lands disclosed that they had a lower forage productivity or commensurability rating than had previously been assigned to them, requiring an additional reduction in grazing privileges. In their appeals, the affected appellants took exception to the District Manager's determination of their base property qualifications and the reductions imposed on the basis of that determination.

The issues raised by the appeals were formulated at a prehearing conference on February 10, 1961, with the concurrence of the parties to the proceeding, and an order was issued by the Hearing Examiner on February 21, 1961, defining the issues as:

"1. What is the carrying capacity of the Willow Creek Unit of the Susanville Grazing District (California No. 2).

2. What is the commensurability of the base property of appellants other than Leroy Cramer, H. T. French, Herbert Miller, Plemons and Sutherlin, Pressman and Rue, and Thomas Swickard.

3. Whether the procedure followed in this matter conforms with the requirements of the Administrative Procedure Act.

4. Whether the provisions of the Taylor Grazing Act preclude the reduction of any license or permit pledged as security for a bona fide loan."

No evidence was presented or arguments made relative to issues number 3 and 4, and they were summarily dismissed by the Examiner.

The California State Director takes issue with the findings of fact and conclusions of law contained in the Hearing Examiner's decision, and appeals therefrom. On appeal he specifies as error the following:

> "1. The Hearing Examiner erred in failing to dismiss all appeals of the range users.
>
> 2. The Hearing Examiner is in error in his interpretation of the burden of proof.
>
> 3. The Hearing Examiner erred in concluding that the evidence is evenly balanced with respect to the accuracy of the disparate results of the two surveys.
>
> 4. The Hearing Examiner erroneously considered certain factors based upon inferences or assumptions.
>
> 5. The Hearing Examiner erred in his inference that the Bureau's commensurability determination and consequent reduction of appellants' licenses and permits were based entirely upon the Bureau's range survey and also erred in determining that no evidence was introduced by the Bureau showing the productive capacity of the appellants' base properties."

The appellants below (appellees here) find the Hearing Examiner's decision satisfactory to their position, and do not appeal, but reply to the contentions, assertions and allegations advanced by the appellant. The appellees' reply is, in substance, a general denial of the appellant's arguments and an affirmative support of the Examiner's reasons and basis on which his conclusions were reached.

In this connection, it appears that the issues to be determined on appeal are those that were considered and determined by the Examiner, and further to determine whether the Examiner committed error in his final conclusions. The appellant has raised other matters, which have been considered in light of the arguments made for and against, but after a careful review of the entire record, it is determined that these matters are not material or germane to the main issues as to whether the Examiner properly remanded the case with instructions to impose a reduction of authorized Federal range use in accordance with the carrying capacity as shown by appellees' survey, and to recompute the base property qualifications of those appellees who suffered a reduction as a result of the District Manager's decision. Accordingly, such matters foreign to these issues are rejected and will not be dealt with further in this decision.

In the first instance, the carrying capacity of the Willow Creek Unit involves many complex problems. If these problems could be resolved by determining the number of animal units that could be adequately supported during the term of one grazing season without consideration for the future, the solution would be quite simple. This, however, cannot be done. There must be consideration for grazing in the future, protection of wildlife, forage conservation, not only for future grazing, but to prevent erosion and to insure the replacement of undesirable weeds and shrubs by palatable plants. The burden of administering the range has been delegated to the Bureau of Land Management and its personnel. Bureau personnel must use the tools provided for them by the pertinent regulations and law to properly manage the range and conserve it for future use.

In the instant case, it was determined by the District Manager that the Willow Creek Unit was obligated beyond its estimated carrying capacity and that a reduction in range use was necessary for conservation purposes. On appeal to the Hearing Examiner, by the users and from the evidence adduced at the hearing, the Hearing Examiner concurred in this determination. After finding that the range was over-obligated, the question remaining was whether the methods employed by the District Manager to reduce the demand on the range was proper. Without reiterating in detail the methods used by the District Manager in the surveys conducted to determine the proper carrying capacity of the range and the resulting readjudication of grazing privileges, which were discussed at length in the Examiner's decision, it is sufficient to say that the (1958-1959) survey was conducted in accordance with standard Bureau practices and is hereby approved. The same approval as to method, is hereby given the 1960-1961 survey conducted by the appellees.

In this respect, recognizing that a sizeable divergence existed between the results obtained by the Bureau in its survey (11,346 AUM's) and the appellees' survey, (27,704 AUM's reduced to 24,225 AUM's by the Examiner to reflect the forage in the receded portions of Eagle Lake, 1300 AUM's, and that necessary to support existing wildlife, 2,179 AUM's) an interim order by the Director placed into immediate effect the conclusion reached by the Hearing Examiner concerning the carrying capacity of the Willow Creek Unit with instructions to the District Manager to impose a temporary percentage reduction of authorized Federal range use for the 1962 grazing season, and issue licenses not to exceed the maximum grazing capacity of the Unit.

On the basis of information available to the Bureau, and not disputed by the appellees, it is apparent that the qualified demand exceeds the carrying capacity of the range. This conclusion is substantiated by the results of both the Bureau's and the appellees' survey. The difference in results is based on the computation and not the actual observations made in the field.

Accordingly, it is demonstrable from the record in this case that a very substantial difference in survey results in accounted for by the adoption of differing forage requirement allowances. The Bureau adopted an 800-pound dry forage allowance whereas range users adopted a 600-pound allowance. Evidence was introduced by the users that the average weight of the animals utilizing the Willow Creek Unit was 800 pounds. This evidence was not rebutted by the Bureau other than to say that its forage acre requirement of 800 pounds was based on an animal unit weight of 1,000 pounds. This information was obtained from accumulated data assembled from studies of other range areas of similar composition. In the absence of evidence to the contrary, this information is acceptable, but where there is evidence of a substantial nature to show that there is a variance between the usual and the conditions in a particular area, the Director has held that computations should be based on studies made in that particular area. Cf. Benton Blackburn, et al., Colorado 4-60-1 (August 31, 1961). As previously noted in this decision, the Bureau's 1958-1959 survey was conducted in accordance with approved methods, and in the absence of positive and substantial evidence of error therein, the results should be used in determining the grazing capacity of the Federal range. Cf. C. A. George, Verna Bowen, I.G.D. 661 (1957). Therefore, it is determined that the proper forage requirement should be 600 pounds instead of 800 pounds based on an average animal unit weight of 800 pounds instead of 1,000 pounds, and that the ratio resulting therefrom (4/3) be applied to the results of the Bureau's survey (11,346 AUM's) to establish the carrying capacity of the Willow Creek Unit at 15,128 AUM's. The Bureau's ratings of forage species are approved. The appellees offered evidence of different ratings, but failed to show wherein the Bureau's findings were in error or to refute evidence presented by the Bureau that its lower ratings were necessary for range conservation.

The final matter to be determined is the adjudication of base property qualifications. It appears from the evidence presented and the record that the Bureau records concerning the qualifications of base property dependent upon the range in the Willow Creek Unit are inadequate. The data on which the adjudication is based was obtained shortly after the Taylor Grazing Act went into effect, supplemented by information obtained from either estimates of the users or from fragmentary dependent property surveys such as the determination of carrying capacity of private range lands made in the present case.

The Hearing Examiner remanded the case to the District Manager with instructions to recompute the base property qualifications of those appellees who suffered a reduction of base property qualifications. In light of the records available, as noted above, it is determined that a current dependent property survey of all the qualified users in the unit should be conducted to properly determine the commensurability of such properties.

Accordingly, the Hearing Examiner's decision is affirmed but modified as indicated.

The appellees are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations.

Karl Landstrom

Director

Enclosure

See distribution on page 7

DISTRIBUTION:

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Assistant Secretary Carver
Appeals List No. 3
Appeals Reading File
Attorneys' Reading File
JJS

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DEPT. OF INTERIOR
SACRAMENTO, CAL.
AUG 1 10 00 AM 1962
BUREAU OF
LAND MANAGEMENT
LAND OFFICE

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

In reply refer to:
6.05c
Re: Sacramento 064660, etc.

July 20, 1962

El Rancho Rio Frio, Inc. : Section 15 Grazing Lease Application

Decision Vacated; Case Remanded

An appeal has been filed on behalf of the above-named corporation from the March 14, 1962 decision by the Manager of the District Office at Redding, California, rejecting its application for a grazing lease describing the following lands: All of sec. 18 and N½ Sec. 20, T. 27 N., R. 8 W., M.D.M., and All of sec. 12 and N½ sec. 24, T. 27 N., R. 9 W., M.D.M.

The District Manager's decision does not elucidate the reasons for rejecting the application other than stating that a review had been made of "the report and records", that the applicant had failed to answer a letter dated January 25, 1962, and that statutory authority 1/ "provides preference right leases to applicants who are owners, homesteaders, lessees, or other lawful occupants of contiguous lands to the extent necessary to permit the proper use of such contiguous lands."

The letter of January 25, was addressed to the manager of the appellant company. On appeal, the president of the company explains that neither he nor any of the other owners of the company ever received the letter and that the individual to whom it was sent was no longer the manager and had not been so a number of months prior to the sending of the letter. The letter of January 25, explained the preference right mentioned above and asked if the company intended to graze livestock on the lands applied for and, if so, how many and the registered brand. The president indicates that the company still wishes the grazing lease and has 14 head of horses to graze on the land during the permissible months.

1/ The Statutory authority is section 15 of the Taylor Grazing Act (43 U.S.C., 1958 ed., sec. 315m). The District Manager's decision erroneously referred to 43 CFR 106.3b, apparently the pertinent regulation, 43 CFR 160.3(b) was intended.

In reviewing the record it appears that the District Manager did not follow proper procedures in rejecting the application. Another grazing lease application conflicted with the appellant's application as to all the lands except the N½ sec. 20, T. 27 N., R. 8 W., M.D.M. A grazing lease for a two-year term was issued to that applicant, Mr. Ronald Wright, on March 9, 1962, a few days prior to the issance of the decision being appealed. That action was premature as both applications should have been considered together with an appropriate decision rendered affecting both applications.

Apparently, the District Manager assumed that the appellant did not qualify as a preference right applicant in accordance with 43 CFR 160.3. In any event, the decision did not set forth any clear reasons for rejecting the appellant's application and it, therefore, appears that further consideration of the application is warranted. In this connection, Mr. Wright's grazing lease for the lands in appellant's application will not be disturbed unless it is shown that it was issued in error.

The appellant may have 30 days from receipt of this decision within which to submit to the District Manager at 2460 Athens Ave., Redding, California, a protest setting forth any reasons and information to show whether or not it qualified as a preference right applicant and, why a lease should have issued to it as to any of the lands. If such a protest is not received within that time, the District Manager will proceed to render a decision on the basis of the present record setting forth the precise reasons for the action taken therein. In considering this case further the District Manager shall follow the principles governing conflicting grazing lease applications as provided in the regulations, 43 CFR Part 160, and as explained more fully in Departmental decision, Roscoe L. Patterson v. Craig S. Thorn, 60 I.D. 11 (1947); and Winchester Land and Cattle Company et al., 65 I.D. 148 (1958).

In view of the foregoing, the decision appealed from is vacated and the case is remanded to the District Manager, Redding District, through the Bureau's State Director for California, for approrpriate action consistent with this decision.

John B. Piccolo
Acting Chief
Division of Appeals

Dist. on page 3

DISTRIBUTION:
El Rancho Rio Frio, Inc. (Regular Mail)
Mr. Ronald Wright (Regular Mail)
Division of Range Management
SD (California), with case file ✓
DO (Redding)
Case File
Perm. File
Appeals Reading File
Attorneys' Reading File
JBT

DOCKET FILES

In reply refer to:
[illegible]
Colorado [illegible]

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

July 1, 1963

Certified Mail
Return Receipt Requested

DECISION

Walter R. [illegible], : Section 15 Grazing Lease (Consolidation)
Protestant-Appellant : Colorado [illegible]

Decision Affirmed

Walter R. [illegible] has appealed to the Director, Bureau of Land Management, from a decision of the land office, [illegible], Colorado, dated February [illegible], 1963, which [illegible] certain isolated tracts of Federal land for sale at public auction, and dismissed the appellant's protest [illegible] lease [illegible] of the tracts.

The record shows that the lands classified for public sale and the subject of this appeal are [illegible] of this [illegible] described as:

T. [illegible] S., R. [illegible] W., [illegible] P. M.
Sec. [illegible]
Sec. [illegible]

The record further shows that the [illegible] acres included in [illegible] order, [illegible], is a small portion of the area included in the appellant's Section 15 lease. The lease consists of a total of [illegible] acres, and disposal of this [illegible] would not materially affect the appellant's live-stock operation.

On appeal, appellant contends that the Manager's decision is in error because the proposed sale is not in the best interest of the local community or the public at large, [illegible] improvements [illegible] and [illegible] the land [illegible] is sold to [illegible] future land value increases [illegible] agricultural [illegible] the improvements [illegible] the loss of [illegible] investment.

The Department has held in [illegible] that the existence of grazing privileges [illegible] not bar the disposal, in accordance with the general [illegible] of Section [illegible] of the Taylor Grazing Act (43 U.S.C. sec. [illegible]) of the land through public sale, and the grazing privileges may be cancelled in order to permit such disposal. See [illegible]

DOCKET FILES

RECEIVED
JUL 5 1963
SACRAMENTO LAND OFFICE

In reply refer to:
6.05c
Riverside 02566

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

July 1, 1963

Certified Mail
Return Receipt Requested

DECISION

Hallie M. Gibson, Protestant-Appellant	:	Section 15 Grazing Lease (Cancellation) Public Sale

Decision Affirmed

Hallie M. Gibson has appealed to the Director, Bureau of Land Management, from a decision of the Land Office, Riverside, California, dated February 12, 1963, which on the Bureau's motion classified certain isolated tracts of Federal land for sale at public auction, and cancelled the appellant's section 15 grazing lease embracing two of the tracts.

The record shows that the lands classified for public sale and the subject of this appeal are two isolated 40 acre tracts described as:

T. 17 S., R. 7 E., S. B. M.
Sec. 33, NE$\frac{1}{4}$NW$\frac{1}{4}$
Sec. 34, NW$\frac{1}{4}$NW$\frac{1}{4}$

The record further shows that the 80 acres included in the classification order, containing 5.3 AUM's, is a small portion of the area included in the appellant's section 15 lease. The lease consists of a total of 400 acres, and disposal of this land would not materially affect the appellant's livestock operation.

On appeal, appellant asserts that the Manager's decision is in error because the proposed sale is not to the best interest of the local community or the public at large; that the grazing lease contributes an irreplaceable and substantial portion to her livelihood; and that the tracts would probably be sold to land speculators who would hope to benefit by future land value increases due to a conversion from grazing to residential, commercial and agricultural uses for which the land is not presently economically or practically feasible for development. Appellant also contends that payment for her improvements on the subject tracts does not justly compensate her for the loss of an investment.

The Department has held in Henry Petz et al., 62 I. D. 33 (1955) that the existence of grazing privileges on land will not bar the disposal, in accordance with the general authority of section 7 of the Taylor Grazing Act (43 U.S.C. sec. 315f) of the land through public sale, and the grazing privileges may be cancelled in order to effect such disposal. Cf. Stewart et al., v. Eastern Oregon Land Company, 57 I. D. 95 (1940).

The appellant has not shown that the partial cancellation of her grazing lease would seriously interfere with her grazing operations or subject her to undue hardship, Cf. James P. Winslow, A-28115 (December 22, 1959), or that the classification of the lands as suitable for disposition at public sale was in error, Cf. Mary Refugio Jackson et al., A-27236 (February 29, 1956).

Furthermore, the land offered for public auction is contiguous to the private lands of the appellant, and being a contiguous land owner would entitle her to a preference right to purchase the land, (43 CFR 250.11(b)). If she exercised her preference right and did purchase the land, it would alleviate her fears of losing an irreplaceable and substantial part of her livelihood in addition to obviating her contention that speculators would obtain the land for conversion to other uses.

Accordingly, for the reasons herein stated and there being no errors apparent on the face of the record, the decision appealed from is hereby affirmed.

Hallie M. Gibson is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington 25, D. C., and the amount of the filing fee will be $5.00. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

John B. Piccolo

Chief, Branch of Mining
and Grazing Appeals
Division of Appeals

Enclosure

DISTRIBUTION
Mrs. Hallie M. Gibson (Certified Mail)
Division of Range Management
Division of Lands and Recreation
Appeals List No. 1
JJS

DOCKET FILES

In reply refer to:
6.05c
Los Angeles 053126

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

July 1, 1963

DECISION

Dr. Robert S. Fadem : Section 15 Grazing Lease (Cancellation)

Decision Vacated, Case Remanded

An appeal has been filed by Dr. Robert S. Fadem with the Director, Bureau of Land Management, from the decision of the District Manager, dated February 18, 1963, cancelling his section 15 grazing lease for the stated reason that on various occasions since the lease went into effect in 1957, the appellant has committed or caused to be committed a series of acts which were calculated to prevent third parties from entering upon and using the leased premises for lawful purposes.

The Manager's decision cited incidents of a series of acts which were calculated to prevent third parties from using the leased premises such as the placement and maintenance of a locked chain and other obstructions across the roadway and cattle guard, the placement and maintenance near the cattle guard of signs calculated to discourage lawful public entry on the leased premises and on at least four occasions, assertions made to mining prospectors or hunters who were lawfully upon or about to enter the leased lands. These acts finally culminated in the institution of a civil damage and injunction suit by the appellant against a mining prospector which resulted in a favorable judgment for the appellant. 1/

On appeal, the appellant while not denying the acts committed offers explanation for such acts and contends that the procedure of the Manager in cancelling the lease was not in accordance with the provisions of the pertinent regulation, 43 CFR 160.19 and the terms of section 3(e) of the lease.

Section 160.19 of the regulations and section 3(e) of the lease provide, among other things, that:

> "* * *, if the lessee shall fail to comply with any of the provisions of the regulations in this part or of the lease * * * * and such default shall continue for 30 days after service of written notice thereof, * * * * the lease may be terminated and cancelled by the authorized officer."

1/ Judgment was entered by a state court on the basis of a stipulation signed by the parties agreeing to the payment of damages by the mining prospector for an assault upon the appellant and the prospector's agreement to refain from entering any realty owned or leased by the appellant.

No notice of violation or default of the lease terms was sent to the appellant as required by the above-cited regulation or in compliance with the terms of the lease. In this connection, the Manager's decision held that the appellant in ejecting the mining prospector and in obtaining a court judgment permanently restraining and enjoining him from the leased land for any reason or purpose whatever, has committed breaches of the lease which he cannot now remedy. Accordingly, the Manager found no basis for application of the provisions of section 3(e) of the lease.

The record reveals that notices were sent to the appellant from time to time for other lease violations and defaults, and it appears that compliance by the appellant was noted in each instance. The Manager, in the present circumstances, assumes impossibility of compliance because of the outstanding judgment of injunction against the mining prospector restraining him from molesting the appellant and forbidding him to enter realty owned, controlled or leased by the appellant. 2/ This assumption is conjecture and a projection of a condition which neither the Bureau nor the appellant have any jurisdiction, but, regardless of what the situation was, it was error to cancel an existing section 15 grazing lease without complying with the terms of the lease. There is no question as to the authority of the District Manager to cancel the lease as long as the procedure in so doing complies with the provisions of the pertinent regulation and the terms of the lease. The terms of the lease are as binding on the authorized officer in the same manner as they are binding on the lessee.

The regulation and the lease do not provide for the waiving of any provisions by the Manager, and in this case, it is mandatory that 30 days be allowed the lessee after written notice to cure a default before cancellation of the lease, or as the Department has held it is proper to remand the matter for further procedure in accordance with the terms of the lease and the applicable regulation. Cf. Albert Braach, A-27225 (December 28, 1955).

Accordingly, the decision appealed from is vacated and the case is remanded to the District Manager through the Office of the California State Director for such further appropriate action consistent with this decision.

Assistant Director

2/ It should be noted that the complaint in the lawsuit, Fadem v. Grigsby, charges assault and slander against the person and son of the appellant and that the stipulated settlement of the controversy was agreed to by the prospector. It should also be noted that no reference is made in this lawsuit to the Federal lands included in the section 15 grazing lease which is the subject of this appeal.

DISTRIBUTION

Samuel L. Sosna, Jr. Esq.
Dr. Robert S. Fadem
Division of Range Management
Division of Lands and Recreation
Appeals List No. 1
JJS

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INTERIOR
CAL.

5 10 30 AM 1963

BUREAU OF
LAND MANAGEMENT
LAND OFFICE

In reply refer to:
C-6-111
6.05c

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

July 17, 1963

Certified Mail
Return Receipt Requested

DECISION

Ebbie H. Davis and D. L. Dawson, : Section 15 Grazing Lease
Appellants : (Temporary Closure)

Decision Affirmed

Ebbie H. Davis and D. L. Dawson have appealed from the decision of the District Manager, Riverside, California, dated February 8, 1963, temporarily closing to all grazing an area of the Federal range included in their section 15 grazing lease. This action was necessary because of the depleted condition of the range and to prevent further damage to the Federal range by continued grazing during the currently existent drought.

On appeal, the appellants acknowledge the need for measures to protect and conserve the range, but question the exigency for the removal of the cattle at this time because of recent rains that have caused a substantial rehabilitation of the forage.

On March 12, 1963, subsequent to the filing of the appellants' appeal and statement of reasons, personnel of the District Office conducted an extensive field examination of the area included in the subject lease. A report submitted by the examiner shows that the moisture conditions are below average even though some rain had apparently fallen in the immediate area just prior to the examination; considerable evidence of overgrazing was observed of plants not considered to be good forage plants; and the overall condition of the range in the area was considered to be poor. The report concluded that while the range in this area is depleted, it is not as severe as the conditions in the Donald L. and Lilas L. Sawyer leased area, but cautioned that any further use of the perennial vegetation would seriously injure the range. (See Assistant Director's decision dated March 26, 1963, approved by Assistant Secretary of the Interior on April 1, 1963, Donald L. and Lilas L. Sawyer, C-6-1).

As noted in the Sawyer case, supra., the Director held that: "where an emergency exists, the District Manager, who is primarily responsible for the range within his district, may take such action within his discretion to alleviate a serious condition by decision or otherwise until such time as the State Director or the Director has had an opportunity to investigate. Either of these officials may confirm the action taken, modify it or supplement it with additional requirements."

In this connection, the regulation (43 CFR 160.13(b)) provides as follows:

> "(b) The authorized officer may close temporarily to grazing portions of the leased lands whenever, because of depletion of the vegetal cover due to drought, epidemic, fire, or any other cause, such action is necessary to restore the forage on the range to its normal condition. Such temporary closing will not operate to exclude such lands from the lease."

In the instant case, qualified personnel of the Bureau have determined that the vegetal cover of the subject range is depleted to the extent that further grazing would cause severe damage to the range, and in accordance therewith have determined that it would be in the public interest to close the area temporarily to further grazing until such time as the forage has recovered. The appellants in substance have agreed to this action by stating that in the absence of additional rain they would be in agreement with a temporary closure.

Accordingly, the decision appealed from is affirmed. In addition thereto, it is hereby ordered that the decision appealed from shall be in full force and effect immediately and will remain in effect until such time as it is determined that the subject range is replenished sufficiently to warrant future grazing without causing damage or deterioration to the range.

This decision constitutes a final administrative determination in the matter. 43 CFR 221.31.

Acting Associate Director

Approved: July 29, 1963

Assistant Secretary of the Interior

DISTRIBUTION
Mr. Ebbie L. Davis and Mr. D. L. Dawson, (Certified Mail)
Division of Range Management
Appeals List No. 1
JJS

In this connection, the regulation (43 CFR [illegible]) provides as follows:

> "(e) The authorized officer may close temporarily to grazing portions of the leased lands whenever, because of depletion of the vegetal cover due to drought, epidemic, fire, or any other cause, such action is necessary to restore the forage on the range to its normal condition. Such temporary closing will not operate to exclude such lands from the lease."

In the instant case, qualified personnel of the Bureau have determined that the vegetal cover of the subject range is depleted to the extent that further grazing would cause severe damage to the range, and in accordance therewith have determined that it would be in the public interest to close the area temporarily to further grazing until such time as the forage has recovered. The appellants in substance have agreed to this action by stating that in the absence of additional rain they would be in agreement with a temporary closure.

Accordingly, the decision appealed from is affirmed. In addition thereto, it is hereby ordered that the decision appealed from shall be in full force and effect immediately and will remain in effect until such time as it is determined that the subject range is replenished sufficiently to warrant future grazing without causing damage or deterioration to the range.

This decision constitutes a final administrative determination in the matter. 43 CFR 221.[illegible]

Acting Associate Director

Approved: July [illegible], 1963

Assistant Secretary of the Interior

DISTRIBUTION
[illegible]
Division of Range Management
Appeals Case No. [illegible]
[illegible]

Appeals Procedure: Dismissal (Grazing Proceedings) 1840.0-7

An appeal to the Director, Bureau of Land Management, from a Hearing Examiner's decision will be dismissed when the notice of intention to appeal or the appeal itself is not timely filed.

J. R. Barron, California 2-65-1 (February 15, 1965)

In reply refer to:
704
California 2-65-1

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

February 15, 1965

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

J. R. Barron	::	Section 3 Grazing
	:	Susanville Grazing District
	:	(California No. 2)

Appeal Dismissed

J. R. Barron has appealed to the Director, Bureau of Land Management, from an order of a Hearing Examiner, dated January 5, 1965, dismissing his appeal from a decision of the District Manager for the Susanville District (California No. 2), dated October 14, 1964. The Hearing Examiner's order granted the motion of the California State Director of the Bureau to dismiss alleging that the appeal did not state clearly and concisely why the District Manager's decision was in error.

The procedure for taking appeals to the Director is contained in 43 CFR 1853.7(a). A Statement of Appeal Procedure setting forth the requirements of the cited regulation was enclosed with the Hearing Examiner's order. That regulation provides in pertinent part:

> "Within ten days after the receipt of the decision of the examiner any party . . . desiring to appeal to the Director shall file a written notice of his intention to appeal . . . . Notice of appeal . . . shall be filed through the office of the Hearing Examiner."

In the instant case, the Hearing Examiner's decision was received by the appellant on January 7, 1965, as shown by a post office return receipt. Thus the last day that the notice of intention to appeal could have been timely and properly filed was January 18, 1965. (The 10th day, January 17, fell on Sunday, a day when the Hearing Examiner's office was not open for business). The record reveals that the notice of appeal was received in the Hearing Examiner's office on January 19, 1965, which was after the period allowed by the regulation had expired.

An appeal in support of the notice of intention was filed in this office on February 9, 1965. In this connection, 43 CFR 1853.7(b) provides:

> "An appeal from any decision of the examiner shall be filed in the Office of the Director, Bureau of Land Management, Department of the Interior, Washington D. C. 20240, together with any brief in support thereof, within thirty days after date of receipt of the transcript of testimony, or, if the transcript is not requested within thirty days after receipt of the examiner's decision . . . ."

Information contained in the record reveals that the appellant did not request a copy of the transcript, so his appeal should have been filed with the Director on or before February 8, 1965. (The 30th day, February 6, fell on Saturday, a day when the Director's office was not open for business). Since the appeal was not timely filed, it also is defective.

The Department has held that the failure to file the notice of intention to appeal or the appeal itself within the time periods provided in the regulations will subject the appeal to summary dismissal. Cf. William S. Young, et al., 66 I.D. 113 (1959); John Stringer, A-28858 (February 19, 1962). Accordingly, the appeal in this case is hereby dismissed.

J. R. Barron is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Department of the Interior, Washington D. C. 20240, and the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

James F. Doyle
Chief, Office of Appeals
and Hearings

Enclosures

DISTRIBUTION:
Mr. J. R. Barron (Certified Mail)
Regional Solicitor, Department of the Interior
Hearings Administrative Assistant
Div. of Resource Management and Technology
Div. of Resource Program Management
Appeals List No. 1
JJS

appeal to Sec
affirmed A-30530 6-15-66

DOCKET FILES

misc

Grazing Leases (Section 15): Temporary Closing of Leased Area 4122.5-4

The temporary closing to grazing of the lands embraced in a grazing lease because of depletion conditions due to a succession of drought years and overgrazing, will be removed when it is determined that because of above-normal precipitation normal grazing operations may be resumed.

Bill and June Cleverly, C-1-208 (Riverside) (July 14, 1965)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1965 JUL 21 PM 2 38

In reply refer to:
704
C-1-208 (Riverside)

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

July 14, 1965

Certified Mail
Return Receipt Requested

DECISION

Bill and June Cleverly : Section 15 Grazing Lease

Decision Affirmed

Bill and June Cleverly have appealed from a decision of the District and Land Office at Riverside, California, dated May 19, 1965, notifying them that the temporary range closure of March 8, 1963, of the lands involved in their above-identified Section 15 Grazing Lease, was terminated as of the date of the decision, and that the full grazing fee will be charged beginning as of the same date.

The reason for the termination of the closure of the particular range lands involved, as stated in the decision appealed from, is that during the winter of 1964-1965 moisture approached normal; during the spring (of 1965), a general storm brought above-normal precipitation to eastern San Bernardino County; range examinations have shown that the forage conditions within the closure area are now better than those which existed during the several years prior to the range closure.

On appeal, the appellants contend, in substance, that the decision appealed from is adverse to them and is incorrect; that although it appears that a general storm brought above-normal precipitation to the eastern part of San Bernardino County, this general storm did not bring the foliage condition of those acreages leased from the Bureau to a condition that would warrant the transportation and re-stocking of those acreages; and, that, although the range examination by the Bureau employees may have shown that the foliage has, in general, been better than the past immediate previous years, the condition of the foliage is still not of a quality that could economically justify the re-stocking of cattle and/or other grazing animals at this time. The appellant, Mr. Cleverly, also asserts that he personally visited the lands in question during the latter part of May, 1965, and talked with other ranchers in the area. He states that although there was some foliage to be found at the time of his inspection, the dry desert winds have already damaged what little foliage might have been available. The appellants conclude that while the storm did assist the area, it did not remove the adverse foliage conditions to justify the removal of the closure order. They state that their conclusion has been concurred in by other well-experienced ranchers in the immediate vicinity.

The record shows the lands in the subject grazing lease, which was assigned to the appellants on May 13, 1963, have not been used for grazing since 1952. The majority of the lands in the lease produce very little forage for livestock most years. Since 1955 there have been but two years, 1958 and 1965, that this range produced sufficient forage for livestock. On May 25, 1965, an employee of the Bureau made a joint inspection of the area with an employee of the Southern Pacific Land Company, which administers grazing leases on intermingled railroad lands in the same area. It was found from this inspection that forage was above average at that time. Record information also indicates that a previous field trip had been made in January, 1964, by employees of the Bureau, who were accompanied by Mr. Cleverly. It was pointed out to him the type of range it is, and that it was not suitable for a cow-calf operation, nor is it a year long range, but only usable for a few months of the year in the years when sufficient precipitation occurs to produce feed.

After carefully reviewing the entire record including the appeal filed by the appellants, we conclude that there was sufficient precipitation to produce sufficient forage for the resumption of normal grazing operations on the lands involved, commencing as of the date of the decision appealed from.

Accordingly, the decision appealed from is affirmed.

Bill and June Cleverly are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations contained in 43 CFR 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240, and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is taken the appellants will have the burden of proving by presenting positive and substantial evidence wherein the decision appealed from is in error.

John B. Piccolo

Chief, Branch of Land Appeals
Office of Appeals and Hearings

Enclosures

DISTRIBUTION
Mr. and Mrs. Bill Cleverly (Certified Mail)
Div. of L&M S&T (4)
Div. of L&M PM (2)
OPD (1)
Appeals List No. 1
RBO

[illegible]
[illegible] DOCKET FILE

Grazing Leases (Section 15) Issuance (Refusal)

The Secretary of the Interior in his discretion may refuse to issue a section 15 grazing lease where it is determined that due to the poor condition of the range, its lack of water distribution, its low carrying capacity, its broken topographic nature and non-contiguity, the available production could not be placed under range management and therefore not in the public interest.

[illegible] Farm [illegible] Company, [illegible], [illegible]
[illegible], (February 1, 1966).

The record shows the lands in the subject grazing lease, which was assigned to the appellants on May 13, 1966, have not been used for grazing since 1952. The majority of the lands in the lease produce very little forage for livestock most years. Since 1952 there have been but two years, 1958 and 1965, that this range produced sufficient forage for livestock. On May 25, 1966, an employee of the Bureau made a joint inspection of the area with an employee of the Southern Pacific Land Company, which administers grazing leases on intermingled railroad lands in the same area. It was found from this inspection that forage was above average at that time. Record information also indicates that a previous field trip had been made in January, 1966, by employees of the Bureau, who were accompanied by Mr. Cleverly. It was pointed out to him the type of range it is, and that it was not suitable for a cow-calf operation, nor is it a year long range, but only usable for a few months of the year in the years when sufficient precipitation occurs to produce feed.

After carefully reviewing the entire record including the appeal filed by the appellants, we conclude that there was insufficient precipitation to produce sufficient forage for the inception of normal grazing operations on the lands involved, commencing as of the date of the decision appealed from.

Accordingly, the decision appealed from is affirmed.

Bill and Jane Cleverly are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations contained in 43 CFR 1840. See enclosed Form 1840-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240, and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is taken the appellants will have the burden of proving by convincing positive and substantial evidence wherein the decision appealed from is in error.

Chief, Branch of Land Appeals
Office of Appeals and Hearings

Enclosure.

DISTRIBUTION
Mr. and Mrs. Bill Cleverly (Certified Mail)
Div. of LAM SAC (4)
Div. of LAM RM (1)
OPR (1)
Appeals Case No. 1
RBC

appeal to Sec.
affirmed A-30594 12-14-66

DOCKET FILES

Grazing Leases (Section 15) Generally 4122.2-3

The Secretary of the Interior in his discretion may refuse to issue a section 15 grazing lease where it is determined that due to the poor condition of the range, its lack of water distribution, its low carrying capacity, its annual vegetative nature and consequently, its variable production would not be proper range management and therefore not in the public interest.

Western Farm Management Company, Crumbaker, Gr. Lse. 4412.3
(Riverside, California) **(February 4, 1966)**

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1966 FEB 16 AM 10 00

In reply refer to:
Crumbaker Gr. Lse. 4412.3
(Riverside, California)
704

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1966 FEB 16 AM 10 00

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

February 4, 1966

Certified Mail
Return Receipt Requested

DECISION

Western Farm Management Co. : Section 15 Grazing

Decision Affirmed

Western Farm Management Company has appealed to the Director, Bureau of Land Management, from a decision of the Acting Manager of the District and Land Office at Riverside, California, dated November 18, 1965, rejecting its application for a grazing lease for certain lands within T. 7 N., R. 1 E.; T. 8 N., R. 1 E. and T. 7 N., R. 1 W., SBM. The application was rejected for the reasons that the area sought has a low carrying capacity of 182 acres per animal unit month, lack of adequate water distribution, and the extensive drought experienced in the past few years, have contributed to the lack of sufficient forage.

On appeal, the appellant does not deny or attempt to refute the statement of fact contained in the Acting District Manager's decision, but asserts that it should be allowed to lease the area sought because, among other things, the appellant has a prior right to the lease, that the area was developed for livestock grazing, that it has paid the lease rental on the area for several years upon failure of the Crumbaker heirs to do so, and that the range has improved during recent months due to the relatively large amounts of moisture and accompanying warm weather.

A review of the case record reveals that the Bureau conducted a range survey of the subject Federal lands on August 10 - 13, 1965, and re-examined the lands on October 25 - 27, 1965. As a result of these surveys, the Examiners found that due to the present poor condition of the range, its lack of water distribution, its low carrying capacity, its annual vegetative nature and consequently, its variable production, the leasing of this area for cattle use would be highly questionable.

In this connection, the applicable regulation (43 CFR 4122.2-3) supplementing section 15 of the Taylor Grazing Act (48 Stat. 1275) and the general instructions in the lease application, state that: "The filing of this lease application creates no right of the applicant to a lease or use of the land." It is also well established and the Department has consistently held that: "It is discretionary with the Secretary of the Interior whether or not to issue a grazing lease under section 15 of the Taylor Grazing Act, as amended." Cf. Felix Bruno, 56 I. D. 289 (1938).

Accordingly, in light of the findings of the field examination of the deteriorated condition of the range and the recommendation of the Examiners, it was determined that it would not be in the best interest of the public and proper range management to issue a lease at this time. If in the future the subject lands are opened for leasing, the appellant will be given an opportunity to apply for a lease.

For the reasons herein stated, the decision appealed from is affirmed.

The Western Farm Management Company is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240 and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error,

John B. Piccolo

Chief, Branch of Land Appeals
Office of Appeals and Hearings

Enclosures

DISTRIBUTION
Western Farm Management Company (Certified Mail)
Div. of Resource S&T
Div. of Resource PM
OPD
Appeals List No. 1
JJS

DOCKET

Grazing Leases (Section 15): Generally—4(2)(a)

The Secretary of the Interior, or his delegate, in his discretion may refuse to issue a section 15 grazing lease where it is determined that the applied for lands have no significant value for grazing of livestock as the vegetative cover consists primarily of brush species, which is chiefly valuable for wildlife habitat, and it is in the best interest of the public and good range management to use the lands for wildlife and watershed purposes only.

Alfred Brown, Jr., Executor of the Estate of George A. Brown, Sr., Deceased, [illegible] Appls. [illegible] ([illegible] District, California) (March 15, 1973).

Accordingly, in light of the findings of the field examination of the deteriorated condition of the range and the recommendation of the [illegible], it was determined that it would not be in the best interest of the public and proper range management to issue a lease at this time. If in the future the subject lands are opened for leasing, the appellant will be given an opportunity to apply for a lease.

For the reasons herein stated, the decision appealed from is affirmed.

The Western Farm Management Company is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form [illegible] and Circular 2157. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240 and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

John B. [illegible]
Chief, Branch of Land Appeals
Office of Appeals and Hearings

Enclosures

DISTRIBUTION
Western Farm Management Company (Certified Mail)
Div. of Resources [illegible]
Div. of Records [illegible]
[illegible]
Appeals List No. 1
[illegible]

misc

DOCKET FILES

Grazing Leases (Section 15): Generally 4122.2-3

The Secretary of the Interior, or his delegate, in his discretion may refuse to issue a section 15 grazing lease where it is determined that the applied for lands have no significant value for grazing of livestock as the vegatative cover,consists primarily of brush species, which is chiefly valuable for wildlife habitat, and it is in the best interest of the public and good range management to use the lands for wildlife and watershed purposes only.

Ernest Pavese, Jr., Executor of the Estate of Ernest L. Pavese, Sr., Deceased, Grs. Lse. Appln, 63213 (Folsom District, California) (March 16, 1967)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1967 APR 12 PM 3 06 (3)

In reply refer to:
704
Ernest L. Pavese, Sr.,
Grs. Lse. Appln.
No. 63213
(Folsom District,
California)

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

March 16, 1967

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

Ernest Pavese, Jr., :
Executor of the Estate of Ernest L. :
Pavese, Sr., Deceased :

Section 15 Grazing Lease Application

Decision Affirmed

Ernest Pavese, Jr., acting as the Executor of the Estate of Ernest L. Pavese, Sr., deceased, has appealed from a decision of the District Manager, Folsom, California District Office, dated November 17, 1966, rejecting the above-identified application to lease the SE¼SE¼ section 7, Lots 10, 11, 12, 13, 14 and 15, section 9, T. 8 S., R. 4 E., MDM., under section 15 of the Taylor Grazing Act of June 28, 1934, 48 Stat. 1275, as amended, 43 U.S.C. § 315m (1964).

Also rejected in the same decision was the application, number 63214, filed by Larry N. Arnerich, for a grazing lease for Lots 10, 11, 12, 13, 14 and 15, sec. 9. The decision below rejected both of the applications on the ground that the lands do not have significant values for livestock grazing as the vegatative cover consists primarily of brush species, which is chiefly valuable for wildlife habitat. Mr. Arnerich did not appeal from the decision within the time allowed, therefore, the decision became final as to the rejection of his application.

On appeal, the appellant, Ernest Pavese, Jr., asserts that the decision appealed from is in error in that the District Manager did not take into consideration the value of the lands for livestock grazing that can follow a private owner's knowledgeable preparation of the lands for grazing. The appellant claims that he is aware that the lands are covered with brush, which must be removed, and that if the decision is reversed in his favor his plans are to (1) start preparation of the lands by controlled burning, (2) seed grasses, and (3) develop small springs. The appellant states that he has the men and equipment available to clear the lands.

The appellant concludes that the lands, when cleared and reseeded, will be a proper and necessary addition to the continuance of the valuable stock raising operation of the ranch now owned by the heirs of the deceased Ernest L. Pavese, Sr. The appellant avers that as the Executor of his father's estate, and as one of the heirs, he should be allowed to put the subject lands into proper condition to provide proper and consistent livestock grazing.

Section 15 of the Taylor Grazing Act, 43 U.S.C. § 315m, supra, authorizes the Secretary of the Interior, in his discretion, to lease for grazing purposes, vacant, unappropriated, and unreserved lands of the public domain, lying outside of established grazing districts. The authority thus vested in the Secretary, or his delegate, is one to be exercised wholly in his discretion. See also Felix Bruno, 56 I.D. 289 (1938). The question of whether or not the leasing of such public lands for grazing purposes will be in the best interest of the public or proper range management is one that must be taken into consideration in the issuance of grazing leases.

Record information indicates that Bureau range conservationists made a careful on-the-ground examination of the subject lands. From this examination it was found that the lands in section 9 are located on the south facing slope of Bollinger Ridge, and the lands in section 7 are located on the south facing slope of Blue Ridge. The lands are densely covered with chapparal, primarily chamise, scrub oak, manzanita, and buckwheat. There is evidence of a very small burn on the area, but there is no appreciable forage for livestock. It has also been determined that while brush clearing and controlled burning have proved successful on highly selective sites, it is very questionable that such a treatment would be successful on the subject lands because of their location on south facing slopes and highly erosive qualities. The area has a very high deer population, and at the present time is chiefly valuable for wildlife and watershed. It has been concluded by the Bureau range conservationists that it would not be economically feasible, or desirable, to clear the lands due to the high erosion hazard and the need of the present vegative cover for wildlife.

Although the appellant alleges that the District Manager erred in that he did not take into consideration the value of the lands for grazing as a result of private owner's knowledgeable preparation of the lands for grazing, the District Manager based his determination on the findings of the Bureau range conservationists. The appellant has not presented any positive or substantial evidence that would refute these findings. Therefore, these findings must be accepted as correct. See Western Farm Management Co., A-30594 (December 14, 1966), and cases cited therein.

Accordingly, we can only conclude that it would not be in the best interest of the public or good range management to issue a grazing lease for the lands involved.

Therefore, the decision appealed from is affirmed.

Mr. Ernest Pavese, Jr., is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240, and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is taken the appellant will have the burden of proving by presenting positive and substantial evidence wherein the decision appealed from is in error.

Edward W. Stuebing
Chief, Branch of Land Appeals
Office of Appeals and Hearings

Enclosures

DISTRIBUTION:
Mrs. H. S. Gilmore, Agent for Appellant (Certified Mail)
Mr. Ernest Pavese, Jr.
Div. of Resource S&T
Div. of Resource PM
OPD
Appeals List No. 1
RBO

the Director, Bureau of Land Management, Washington, D. C. 20240, and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is taken the appellant will have the burden of proving by presenting positive and substantial evidence wherein the decision appealed from is in error.

Chief, Branch of Land Appeals
Office of Appeals and Hearings

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DISTRIBUTION:
Mrs. H. S. Gilmore, Agent for Appellant (Certified Mail)
Mr. Ernest Pavese, Jr.
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OPD
Appeals List No. 1
RBO

Grazing Leases (Section 15): Cancellation 4122

Grazing leoases awarded to a preference applicant on the basis of control of contiguous lands must be cancelled to the extent the lessee loses control of the respective base lands.

M. A. Weatherwax, California C-1-1071 (September 11, 1967)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1967 SEP 25 AM 10 00

In reply refer to:
704
C-1-1071

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D.C. 20240

September 11, 1967

Certified Mail
Return Receipt Requested

DECISION

M. A. Weatherwax : Section 15 Grazing Lease

Decision Affirmed

M. A. Weatherwax has appealed from a decision of the District Manager, Bakersfield California District, dated May 10, 1967, cancelling in part his above-identified grazing lease issued under section 15 of the Taylor Grazing Act of June 28, 1934, 48 Stat. 1275, as amended, 43 U.S.C. §315 (1964).

In the decision below the lease was cancelled as to approximately 2,237 acres, as described therein, of the approximately 3,197 acres formerly included in the lease, for the reason that the appellant no longer owns or controls 10,134 acres of the 12,374 acres of private lands recognized as preference right lands for the issuance of the subject lease. The decision held that the appellant was entitled to 960 acres of the leased lands on the basis of the fact that he apparently still owns or controls 2,210 acres of the preference right lands. 1/ The decision also recites that an application for a grazing lease has been submitted by the person presently in control of the 10,134 acres of preference right lands, and that it has been determined that the 2,237 acres of the public lands cancelled from the lease can be utilized in connection with this portion of the preference right lands. It was also determined that the remaining 960 acres of the leased lands, as described in the decision, could best be utilized with the preference right lands still under control of the appellant, and that these 960 acres of the leased lands will remain intact in the subject lease.

In a letter dated June 30, 1967, the appellant states the following as the reasons for his appeal:

1/ The remaining lands owned or controlled by the appellant should be shown as 2,240 acres rather than 2,210 as stated in the decision. 12,374 - 10,134 = 2,240 acres.

We are attaching herewith the following papers setting forth our position and reasons for "Appeal" of decision by your local Director. Our Lease.

Sec. 15, T.G.A.
No. C-1-1071

Kern County
a per letter dated May 10, 1967

Attached papers - Original Summons and Complaint #97362
filed in Superior Court Oct. 10, 1966

2 - Copy of letter to Lawrence Snow dated Feb. 8, 1967
3 - Copy of letter to B. L. M. Director " April 24, 1967

These facts' cover the problems we are having from a Loan entered into in 1965 and our position is set forth.

We have not lost control of the property. We ask that the lease remain in our name until this matter is settled.

The cattle placed on this Ranch by Lawrence Snow are without our Permission

The cattle are trespassing on our land that is not included in the Levinson Collateral. The only way this can be avoided is for these cattle to be removed.

We ask relief from this by restoring our lease in its form before the action mentioned in the B. L. M. letter to cancell dated May 10, 1967.

Attached to and made a part of the appeal were the copies of the documents mentioned in the appellant's letter.

The facts of record are these:

The appellant was issued the subject grazing lease for 3197 acres of public lands beginning May 1, 1963, for a period of ten years. This was renewal of a previous ten year grazing lease issued to him. On March 14, 1967, the Bakersfield District Office received a grazing lease application from Lawrence Snow for 2942 acres of the lands included in the appellant's lease. Accompanying Mr. Snow's application was a copy of a grant deed, dated April 13, 1965, whereby M. A. Weatherwax and Maxine M. Weatherwax conveyed fee title to the 10,134 acres of lands described therein to Albert Levinson and Lilian Levinson. The lands described in the deed comprise 10,134 acres of the 12,374 acres of the lands originally used as a basis for a preference right for the issuance of the grazing lease to the appellant. Also included in Mr. Snow's application was a copy of a five-year grazing lease to Snow from the Levinson embracing the 10,134 acres in question. This lease was dated December 13, 1966. On the basis of the evidence contained in the documents submitted with the Snow application, the District Manager on March 22 1967, called upon the appellant to submit proof of ownership or control of the private lands recognized as a preference right for the issuance of the subject grazing lease, this request being made in accordance with the terms of the lease contained in section 3(h) thereof, relating to the loss of control of preference right lands.

On March 17, 1967, the appellant submitted to the District Office a copy of a letter from his attorneys addressed to Lawrence Snow, wherein it was stated that he, the appellant, was not interested in issuing a grazing lease to Snow and that he was the sole owner of the property described in the letter, comprising the 10,134 acres of land in question here. The appellant was informed by the District Manager that this letter was not sufficient proof of control of the preference right lands and that additional documentation would be needed. On April 18, 1967, an employee of the Bureau's District Office made a field inspection of the lands in question in company with the appellant. At that time the appellant handed the employee a copy of a court action titled "First Amended Complaint For Declaratory Relief", in which the appellant alleges that the grant deed issued to the Levinsons by himself and his wife, was used as a colateral for a loan and was not intended to be a transfer of ownership. To support this claim, the District Manager called upon the appellant to produce a written agreement to this effect, which the appellant did not do. On April 24, 1967, the appellant addressed a letter to the District Manager, in which he states, in substance, that he did not intend to rent pasture to Lawrence Snow, and that neither the Levinsons nor anyone else had authority to lease the land to Mr. Snow, or to use the lands, and that in accordance with the court complaint filed by him, he is arranging to pay the Levinsons what he owes them and has not lost control of the property in question. The appellant was informed that he still had not submitted sufficient proof that he retained control of all of the preference right lands upon which the original lease was based.

An inspection of the records in the Kern County Assessor's Office by Bureau employees revealed that the Levinsons had paid the property taxes for the last half of 1965, all of 1966, and the first half of 1967, on the lands described in the grant deed. Also the Transamerica Title Insurance Company was contacted, and assured the District Manager that a Title Insurance Policy had been issued to the Levinsons; that the transaction had gone through escrow; that the grant deed had been recorded in the Kern County Records; and, that as far as the company was concerned the grant deed legally conveyed fee title to the lands described therein from the appellant and his wife to the Levinsons.

On April 26, 1967, the appellant submitted to the District Office five separate documents consisting of (1) an option from Levinson to one Floyd Ming to purchase the lands described in the Grant Deed, (2) an assignment of this option from Ming to himself, (3) an eighteen-month grazing lease from Levinson to himself which had expired October 15, 1966, (4) a "Pasture Agreemment" between himself and Mr. Snow, and (5) a court summons initiated by the appellant against the Levinsons, and other defendants under fictitious John Doe names as set forth therein.

After carefully reviewing the entire record in this matter, we must agree with the District Manager that the appellant has presented no positive or substantial evidence that the presently owns or controls the 10,134 acres of the preference right lands conveyed to the Levinsons by the grant deed. As to the appellant's request that the subject grazing lease remain intact until this matter is settled in the courts, we can only say that the Bureau must decide whether or not the appellant is entitled to a lease of all of the public land involved on the basis of positive evidence of ownership or control of the preference right lands upon which the lease was issued. In accordance with the terms of the lease itself, as contained in section 3(h) thereof, the lease is subject to termination in whole or in part because of the loss of control by the lessee of all or any part of the lands that have been recognized as the basis for a preference right to lease. It has been so held by the Department in numerous cases, among which are, *The Swan Co.*, v. *Banzhaf*, 59 I.D. 262 (1946); *George Fred Hays* v. *Mrs. Helen Williams*, A-24594 (March 1, 1948); *Joseph Rebich et al.*, A-27491 (January 13, 1958).

The appellant has initiated court action to determine if he has any legal right to the 10,134 acres of land conveyed to the Levinsons by the grant deed of April 13, 1965. This is a matter for the courts to decide, not the Bureau. There is a possibility that this litigation may not be settled for a considerable length of time. In the circumstances, there is no justification for holding the lease issued to the appellant in status quo pending final disposition of this litigation, as requested by the appellant. It is recognized, however, that until a final administrative determination has been had in the Department as to the partial cancellation of the lease, that the appellant should continue to use all of the lands embraced therein. By letters dated June 15 and July 5, 1967, respectively, the District Manager so notified the conflicting applicant, Mr. Snow, and the appellant. The appellant has paid the full amount of rental for the current lease year.

As to the alleged trespass of Mr. Snow's cattle upon the private lands still owned or controlled by the appellant, it can only be said that this is a matter that must be settled by the parties themselves, or in the local courts. It is not within the jurisdiction of this Bureau to settle.

Accordingly, the decision appealed from is affirmed.

When this decision becomes final the case will be remanded to the District Manager for further appropriate action as is necessary in the circumstances.

M. A. Weatherwax is allowed the right of appeal to the Secretary of the Interior in accordance with the regulation in 43 CFR 18 40.See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240, and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is taken the appellant will have the burden of proving by presenting positive and substantial evidence wherein the decision appealed from is in error.

If an appeal is taken the adverse party to be served is:

Mr. Lawrence E. Snow
6314 Tallman Drive
Bakersfield, California 93308

Edward W. Stuebing
Chief, Branch of Land Appeals
Office of Appeals and Hearings

Enclosures

DISTRIBUTION:
Mr. M. A. Weatherwax (Certified Mail)
Mr. Ardon Judd, Attorney at Law (Regular Mail)
Mr. Lawrence E. Snow (Regular Mail)
Div. of Resource S&T
Div. of Resource PM
OPD
Appeals List No. 1
RBO

Grazing Leases (Section 15): Renewal 4130.3-1

Where, upon the renewal of a grazing lease, the lessee requests an earlier season of use, it is proper to refuse that request and to set a later turnout date in the interest of good range management.

Dan O'Hare, Section 15 Grazing Lease (April 1, 1980)

misc

Grazing Leases (Section 15): Renewal 4122.3-1

Where, upon the renewal of a grazing lease, the lessee requests an earlier season of use, it is proper to refuse that request and to set a later turnout date in the interest of good range management.

Tom O'Hare, Section 15 Grazing Lease (April 1, 1968)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1968 APR 22 AM 10 00

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

In reply refer to:
704
Sec. 15 Grazing Lease
Mr. Tom O'Hare

April 1, 1968

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

Tom O'Hare : Grazing Lease
:
: **Decision Affirmed**

By decision of February 2, 1968, the District Manager, Redding District Office, approved the renewal of the grazing lease applied for by Mr. Tom O'Hare for 965 acres in Siskiyou County, California, establishing the season of use for the three-year term of the lease as from April 15 to July 15 of each year. The lessee has paid the rental for the term of the lease, but has appealed as to the season of use.

The appellant states that his Forest Service permit for adjacent lands starts on April 1, that he needs an earlier season to help his operation as a cattle ranch, and that the grass on the lands in this lease is bunch grass and "as you know drys out early. It is nearly gone by June 1."

The record indicates that the primary reasons for changing Mr. O'Hare's season of use are the lack of adequate forage at the early date he has requested and the soil erosion problem present at this time. "Green-up" on the north slope, where most of Mr. O'Hare's lease is situated, is approximately in the middle of March. The continuous early spring grazing he has requested would reduce the root reserve of the plants, and this would result in the loss of individual plant vigor, the loss of stand density, and eventual loss of the perennial vegetation, ultimately creating erosion hazard. During the early spring period the soils in this area reach a saturated condition and will normally remain at almost field capacity until April 1st. Because of the light soil mantle during the time of this saturation, livestock use of this area would create excessive soil loss, loss of perennial vegetation, and would most likely result in loss of a substantial amount of the soil mantle. In view of these conditions, the season of use requested by Mr. O'Hare is too early and would do irreparable harm to the land.

An earlier season of use is therefore not justifiable in the interest of good range management. In view thereof, the decision of the District Manager was correct in setting April 15 as the turnout date for Mr. O'Hare's lease, and it is affirmed.

Mr. O'Hare is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240 and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

Edward W. Stuebing
Chief, Branch of Land Appeals
Office of Appeals and Hearings

Enclosures

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Mr. Tom O'Hare (Certified Mail)
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Div. of Resource S&T
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OPD
Appeals List No. 1
LSH

Grazing Leases (Section 15): Cancellation 4122.3-5

A grazing lease may be cancelled in part where a part of the leased lands are found to be more valuable for transfer to the State for recreation and public purposes, pursuant to the Recreation and Public Purposes Act, than they are for grazing.

Jerry W. Blair, Howard P. Blair, Riverside 02352 (June 3, 1968)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1968 JUN 24 AM 10 00

In reply refer to:
704
Riverside 02352

June 3, 1968

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UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

DECISION

Jerry W. Blair :
Howard P. Blair : Section 15 Grazing Leases
:

Decision Affirmed As Modified

Jerry W. Blair and Howard P. Blair have appealed from a decision of the District Manager, Riverside District and Land Office, dated December 5, 1967, dismissing their protest relative to the cancellation in part their above-identified Section 15 grazing lease. The lease was cancelled as to 3,745 acres of land which have been classified as suitable for transfer to the State of California, Department of Parks and Recreation, in connection with its application, Riverside 02352, pursuant to the provisions of the Recreation and Public Purposes Act of June 14, 1926, 44 Stat. 741, as amended, 43 U.S.C. § 869 et seq. (1964).

The decision below, in addition to allowing the State's application as to the lands in question, recites that the allegations contained in a protest submitted by the appellants in a letter dated November 26, 1963, [1], which have not been set forth in the decision, have been reviewed and the pertinent findings as to the allegations are outlined as follow:

1. The loss of approximately 3,745 acres from the grazing lease would not materially affect the overall operation. The current ranch operation consists of 30,477 acres of state and railroad leased lands, 700 acres of private lands and 164,480 acres of Section 15 lease lands.

2. The lands included in the grazing lease that have been classified for disposal are located on the extreme western edge of the lease and would not materially affect the movement of livestock. The proposed area would not therefore, "cut a hole in the middle" of the lease as stated in the protest.

---

[1] The appellants' protest was previously before the Bureau in connection with appeals filed by both the State of California and the grazing lessees. However, at the request of the Bureau's State Director for California the cases were remanded for further consideration by Bureau decision dated January 19, 1967, without disposing of the protest.

3. The lessees' concern of having to fence off the park area due to the area being closed range under the California fence law is resolved by a requirement that the State will fence the area.

4. There are two springs in the area (Cooks Well and Gilroy Spring). Neither spring is producing. The Bureau of Land Management has no record of Gilroy Spring or any improvements thereon. Cooks Well is covered by a cooperative agreement and assigned Project Number C-6-R-3. However, the value of materials remaining are negligible and are not considered to be worth the expense of salvage. A new pipeline has been constructed under cooperative agreement from Bonanza Well and Baber Well south along and beyond the entire eastern boundary of the proposed park. This new pipeline services all of the area formerly serviced by Cooks Well and Gilroy Spring as well as additional areas. Therefore, there is no loss of water that would be detrimental to the distribution of livestock on the federal range.

5. When the lands to be included in the park addition are fenced, there will be no further need for the grazing lessees to have any roads into the area for servicing improvements or otherwise.

The appellants state, in pertinent part, the following as their reasons for their appeal:

> The decision was made to take away our well, pipeline, tanks, and other personal property without compensation.
>
> In answer to the first reason, this land runs lengthwise along the foot of the highest mountain range. It nearly always rains more around the mountainous areas because of the thermal activity created by the mountains. In the summertime when rain is scarce on the desert, this could be the only place on the ranch that would get any rain. Consequently, the loss of this property would affect our operation a great deal. The decision on this reason should be made by someone with much experience in the livestock industry, instead of someone with no experience whatsoever.
>
> On the second reason, even though the land is located on one side of the ranch, it extends into the ranch so that the perimeter around it is quite a few miles around. In the hot summertime you would have to drive the cattle around instead of across.

> The fourth reason is not true. The Cooks spring is not dry, and has never been dry in the fifty years we have been in the country. The spring was recorded in 1879 by the original owner, and we have all the papers from the time on. The pipeline, tanks, and troughs are being used every day and were not meant to be salvaged. There are very few things built today that would be worth the expense of salvaging. The new pipeline is a good auxiliary line, but the source of water is several miles away, and it is very difficult and costly to keep water running continuously down the line. In the wintertime the line could be frozen for days at a time. Also all the water that is put in this line must be pumped, which means an additional expense, whereas the water from Cooks spring runs out by gravity continuously.
>
> The statement "no loss of water" is completely mis-leading, because it tends to say that because there is a pipeline there would naturally be water in it.

The appellants conclude by asserting again that some disinterested party with much experience in their type of operation should be consulted before a decision like the one appealed from is made.

It must be pointed out at the outset that the existence of a grazing lease will not bar disposal of the leased lands, in accordance with the general authority under Section 7 of the Taylor Grazing Act of June 28, 1934, 48 Stat. 1272, as amended, 43 U.S.C. § 315f (1964). It is so provided in the lease issued to the appellants, under Section 2(e) thereof. It is also well established that a grazing lease will be cancelled to effect such disposal where it is determined to be in the best interests of the public to do so. Cf. Henry Petz et al., 62 I.D. 33 (1955); Meadowbrook Lodge, Inc., A-30432 (October 27, 1965); C. O. Bar Livestock Company, A-28498 (September 18, 1961); Dr. and Mrs. A. J. Kafka, A-29807 (February 3, 1964).

Moreover, the Recreation and Public Purposes Act, *supra*, authorizes the Secretary of the Interior to examine and classify public lands for lease or disposal under specified limitations and conditions to qualified applicants, including a political subdivision of a State, for recreation and public purposes. Whether or not such lands are to be disposed of under said act is a matter committed wholly to the discretion of the Secretary, or his authorized delegate.

In order to sustain their protest against the transfer of the subject lands to the State of California pursuant to its Recreation and Public Purposes application, it would be necessary for the appellants to show, postively, that such transfer would not be in the best interest of the United States; that the lands have not been properly classified as suitable for disposal for recreation and public purposes, to be administered by the State of California Department of Parks and Recreation in connection with its recreation program for the area involved; that they have an interest in the lands, which would preclude favorable consideration of the State's

application; or there are other equally cogent reasons for denying the transfer of the lands to the State. See State of California, 67 I.D. 85 (1960); Mary Refugio Jackson et al., A-27236 (February 29, 1956); Meadowbrook Lodge, Inc., supra.

After carefully reviewing the entire record in this matter, we can only conclude, that while disposal of the lands to the State will have some adverse affect on their livestock operations, the appellants have not shown, nor do they in fact claim that loss of the lands will cause them undue hardship, or put them out of the livestock business. Regardless of the appellants' allegations with respect to Cooks Well (or Cooks spring, as they refer to it), the records show, and the appellants admit that the loss of the use of the water from this source is being replaced by a new pipeline from Bonanza Well and Baber Well. As stated in the decision appealed from, this pipeline will service all of the area previously serviced by Cooks Well, as well as additional areas. Although the appellants assert that it would be difficult and costly to keep water running in the new pipeline, they have presented no factual evidence to show that this would be entirely impossible or prohibitive. They merely state that it will be necessary to pump water into the new pipeline, and will be more expensive than obtaining water from Cooks spring, which they assert runs out by gravity. The appellants do not specifically state, nor do they show, that the loss of the 3,745 acres being transferred State would seriously affect or curtail their livestock operations. In fact it appears that the loss of these lands will have a very minor affect on their operations in view of the fact that they have under lease some 165,480 acres of other Section 15 lands, and in addition, own or control some 37,477 acres of state, railroad, and private lands.

On the other hand, the records show that the 3,745 acres proposed to be transferred to the State are required for the enlargement of the State's Mitchell Caverns State Reserve and development of all of its recreation potential because of the rapidly expanding population in the metropolitan areas of California, and ever-increasing need for recreational areas. The principal access to the Mitchell Caverns and Providence Mountains in this Reserve is from U. S. Highway 66, future Interstate Highway 40 at the town of Essex, and by county road for a distance of some 26 miles. This area is only a distance of 265 miles from center of the Los Angeles metropolitan area. Thus, transfer of the subject lands to the State of California for recreation and public purposes will be of far greater benefit to the public interest than to retain them for grazing purposes.

Although appellants' intimate that they may have some claim of ownership of Cooks Spring, they have presented no evidence in support of such a claim. The records of the land office establish conclusively that the spring or well is located on public lands of the United States.

As to the appellants contention that an attempt is being made to deprive them of improvements on the subject lands without compensation, it is noted that the records show that the improvements were placed on the lands at

Cooks Well under a cooperative project between the appellants' predecessor, Herbert F. Murphy, and the Bureau of Land Management. Of the total cost of the project, which was completed in 1942, Mr. Murphy contributed approximately $163.00 in labor and transportation, and $42 for material in the pipeline. According to the records, the current estimated value of the material contributed by the appellants' predecessor would be approximately $300. Under 43 CFR 4122.3-5 the authorized officer can waive compensation to the United States for its share of the improvements, but the regulation affords no basis for an administrative determination that the lessee's interest should go uncompensated unless it valueless. The legal doctrine of *de minimis non curat lex* will not apply where the lessee's interest in the improvements in place is estimated at $300, or even at a substantially lower figure. Accordingly, insofar as the decision below denies the appellants compensation for their interest in the physical improvements in Project No. C6-R-3, it is reversed. When this decision becomes final the case will be remanded for action in accordance herewith under the procedures prescribed in the regulation, *supra*.

The appellants have failed to sustain their protest against the transfer of the subject lands to the State of California. Accordingly, the decision appealed from is affirmed, as modified.

Jerry W. Blair and Howard P. Blair are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240, and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is taken the appellant will have the burden of proving by presenting positive and substantial evidence wherein the decision appealed from is in error.

If an appeal is taken the adverse party to be served is:

State of California
Department of Parks and Recreation
Division of Beaches and Parks
P. O. Box 2390
Sacramento, California 95814

Edward W. Stuebing
Chief, Branch of Land Appeals
Office of Appeals and Hearings

Enclosures 2

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OPD
Appeals List No. 1
RBO

Grazing Leases (Section 15): Conflicting Applications 4121.2-1(d) (formerly 4122.2-5)

Where the division of lands for leasing purposes between preference-right applicants is made on an equal plane of preference, and the records show that all factors involved do not clearly indicate that the division was equitable, the cases must be remanded for reconsideration and clarification of whether there is an equal plane of preference and an equitable division of the lands between the parties.

A. M. & I. L. Robinson and Charles L. Krusp, A. O. Chatham, Section 15 Grazing, Trinity County, California (October 24, 1968)

DEPT OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1968 NOV 4 AM 10 00

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

In reply refer to:
704
Section 15 Grazing Leases
Trinity County, California

October 24, 1968

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DECISION

A. M. and I. L. Robinson, : Section 15 Grazing Leases
and Charles L. Krusp :
:
A. O. Chatham :
:

Decision Vacated - Cases Remanded

By decision of June 20, 1968, the District Manager, Redding, California, offered the above-named parties Section 15 grazing leases for the lands described therein. The lease offer to the Robinson-Krusp ranch operations was a renewal of their prior lease for a period of 10 years for an aggregate of 2085.29 acres, being only 28 acres less than they had been leasing in prior years, exclusive of the one-year temporary administrative addition of 156.23 acres for the year which expired on June 16, 1968. The same decision also offered A. O. Chatham a lease for 1212.50 acres. Both leases were conditioned on the building of a fence across a portion of sec. 34, T. 32 N., R. 9 W., to separate the areas offered to each lessee. Both parties are preference-right applicants, and were considered to be on an equal plane of preference based on ownership of contiguous lands and their need for the application areas (43 CFR 4122.1-2(b)).

Several meetings were held in an attempt to resolve the conflict between the parties, but proved fruitless as neither party would agree to any division of the land in conflict. The division of the lands was therefore made, as stated in the June 20, 1968, decision, based on topography and existing fence lines; to promote proper range management through control of stock numbers and season of use; and to improve the watershed conditions in that area. The record further shows that the District Manager believed both parties could have stabilized livestock operations by allowing the use as outlined above.

Robinson-Krusp have appealed from the District Manager's decision. They argue that Mr. Chatham has never leased land in Trinity County, does not have a year-round livestock operation, and is therefore not entitled to a lease in this area. They state further that stabilization of existing ranch operations is a very poor basis for the District Manager's decision, since the number of cattle they are permitted to run has been reduced three times since 1963. The record indicates that the reductions were made because of the limited carrying capacity of the lands leased to Robinson-Krusp, and the need to improve the watershed conditions and the forage.

The appellants charge that Mr. Chatham has never leased land in Trinity County, but has been running cattle in this area for many years, is not a substantial basis for denying him a lease, since his ownership of contiguous lands gives him a preference right to a portion of the lands at issue.

The appellant also claim that they will lose the use of their privately-owned water rights in Reading Creek. Robinson-Krusp are the fee owners of the servient land in sec. 33 through which Reading Creek runs. This tract is separated from the main ranch in secs. 28 and 29 by the NW$\frac{1}{4}$ sec. 33 on which it corners, and part of the S$\frac{1}{2}$ sec. 28. All the available land in sec. 33 has been awarded to Mr. Chatham in the proposed lease, thus completely surrounding the Robinson-Krusp fee lands and the claimed Reading Creek water rights in sec. 33, and cutting them off from access thereto. Except for the E$\frac{1}{2}$NW$\frac{1}{4}$NE$\frac{1}{4}$NW$\frac{1}{4}$ sec. 33, Robinson-Krusp have not applied for any lands in sec. 33. They allege that they were not aware of any other lands available in sec. 33, and would have applied for them if they had known such lands were subject to lease.

The appellants also claim that it would be impossible to separate secs. 34 and 35 by fencing because of the topography, and they would therefore lose the use of sec. 35 now under private lease to them. While the record indicates that the topography may be such as would not lend itself to drifting of cattle from sec. 34 into sec. 35, there is not enough information of record to clarify this point and upon which to make a valid determination.

The Department has stated that where two applicants for grazing leases have equal preference rights, the leases should be awarded on the basis of land use pattern, the applicants' equities, their comparative ability to use the range properly, the amount of Federal range necessary to permit proper use of the base land, and other factors relevant to the purposes of the Taylor Grazing Act. A division of lands for leasing purposes between preference-right applicants on an equal plane of preference will not be disturbed where a review of all factors involved indicates that the division is equitable. Camp Creek Cattlemen's Association, et al., A-30418 (October 28, 1965); Abraham Lorenz, A-29918 (May 25, 1964). See also Robert M. Deaver, Angela Matthews Boos, Wyoming 6-68-1 (January 12, 1968); Edward S. Grady, Montana MDO 175, 176 (February 3, 1967). It has also been held that the District Manager may impose reasonable requirements upon a Section 15 grazing lessee in construction of a fence on the leasehold to insure proper range management. Irvine Brothers, Wyoming W6-67-2(15) (March 30, 1967).

The record fails to show clearly that both applicants are on an equal plane of preference, and the information of record does not conclusively indicate that the award of the lands was made in consideration of all the factors discussed above, and in the appeal. Accordingly, the District Manager's

decision of June 20, 1968, is vacated, and the case records are remanded to that official, through the State Director, California, for reconsideration of the matters and issued discussed above.

Edward W. Stuebing

Acting Chief, Office of Appeals
and Hearings

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Appeals List No. 1

Grazing Leases (Section 15): Applicants—[illegible]

An application for the renewal of a grazing lease [illegible] where the applicant shows no need for the [illegible] sought for a bona fide grazing purpose.

[illegible] Knight, [illegible] (Wyoming) [illegible]

Grazing Leases (Section 15): Applicants--Generally (Renewal) 4121.1-1(a)

An application for the renewal of a grazing lease is properly rejected where the applicant shows no need for, nor contemplates using the lands sought for a bona fide grazing purpose.

Edith Craven Knight, 04060049 (Riverside) (September 16, 1969)

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1969 OCT 6 AM 10 00

In Reply Refer to:
141
04060049 (Riverside)

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D.C. 20240

September 16, 1969

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DECISION

Edith Craven Knight	:	Section 15 Grazing Lease (Renewal)

Decision Affirmed

Edith Craven Knight has appealed from a decision of the District Manager, Riverside District and Land Office, dated March 20, 1969, rejecting her application to renew the above-identified Section 15 grazing lease. The application was rejected primarily for the reason that the appellant is not a qualified applicant for a grazing lease within the purview of the applicable regulation, 43 CFR 4121.1-1(a), because she has never made use of the lease lands for grazing purposes, has indicated that she does not plan to so use the subject lands, and she indicates that her only need for the lands is to help her find a buyer for her base lands and other leases, in order to recoup certain financial losses.

The appellant has summarized her reasons for her appeal as follows:

> Therefore, I do hereby respectively request that the adverse Decision to reject my recent application for a Grazing Lease be reconsidered and a 5 or 10 year lease be granted me on the following basis:
>
> 1 . . . A new 5 or 10 year lease, with the first year free of charge only to me. A new buyer will pay from the moment he takes over to the end of the lease.
>
> 2 . . . That because of the great loss suffered by me--but through no fault of my own--that my great need be recognized and that a lease be granted me.
>
> 3 . . . That my ownership of livestock--even though they are in South Dakota--be recognized and qualify my eligibility for this lease.
>
> 4 . . . That recognition of my Lienholders right be made by the officials of the BLM and that I am owner since 1952 of leases No. 055075 and LA 054668, known as the Lazy Daisy Leases which were and are tied to my commensurate deed acreage of 233 acres and are inseparable.

5 . . . That I am eligible under Paragraph 4125.1-4 of the BLM rules for financial assistance in all underground range and ranch improvements as already listed and that such rights or improvements can be passed on to a buyer of my ranch.

6 . . . That all my Constitutional and Civil Rights be recognized.

7 . . . That my right to regain losses on this ranch and the great amount of time and effort lost since 1952 be recognized and that nothing more be placed to obstruct my progress to do whatever is legal, right and just in this matter.

8 . . . That positive, helpful and intelligent co-operation be given me in all my dealings in the matter of selling the ranch so that this all can be brought to a happy and useful end for all.

9 . . . If you wish it, I can give you the finest of character references if this will further prove that I have engaged in no untruths or mis-statements in order to gain my goal.

We must concur with the District Manager that the appellant is not a qualified applicant for a grazing lease for the lands involved within the purview of the applicable regulation, 43 CFR 4121.1-1(a), which provides in pertinent part that:

> An applicant for a grazing lease is qualified if:
>
> > (a) He is a person engaged in the livestock business, has a need for the grazing use of the land, * * *. (Emphasis supplied).

It is quite evident from the statements made by the appellant in her appeal, and as pointed out in the decision appealed from, that the only reason for the appellant's seeking the renewal of the subject lease is her purported need for the lands to help her recoup losses she has sustained in transactions involving the sale of the privately owned or controlled lands upon which the former grazing lease was based. It is quite obvious also that the appellant does not contemplate using the lands sought to be leased for any grazing purposes whatsoever.

The need for the subject lands merely for the purpose of helping the appellant recoup financial losses she may have incurred in connection with transactions involving her privately owned or controlled lands, is not a need for the lands applied for for grazing use as specified in the above-cited regulation. Moreover, it is well established that the Department has no

authority to lease lands under Section 15 of the Taylor Grazing Act of June 28, 1934, 48 Stat. 1275, as amended, 43 U.S.C. 315m (1964), for anything except grazing purposes. A Section 15 lease is intended only to authorize the grazing of livestock belonging to the applicant on the lands sought to be leased. Cf. The Swan Co., v. Alfred and Harold Banzhof, 59 I.D. 262 (1946); Wayne S. Johnson, Walter L. Edwards, A-26160 (May 24, 1951); G. Phil Kent et al., A-27039 (March 23, 1955); Nyswonger Brothers, Ebbie Davis and Sam Fancher, A-27238 (February 29, 1956). Similarly, it has been held by the Department that Section 15 of the Taylor Grazing Act, supra, contemplates the award of leases thereunder not merely to owners, but to owners who are occupying and using the contiguous lands for the grazing of livestock. Orin L. Patterson et al., 56 I.D. 380 (1938).

In other words, an applicant for a Section 15 lease must use the leased lands for a bona fide grazing purpose and must be engaged in the livestock business or give reasonable assurance that he will be so engaged in the near future. E. W. Davis, A-29889 (March 25, 1964). The fact that the appellant owns livestock in South Dakota without any indication that these livestock will be placed on and make use of the public lands sought to be leased in California does not qualify the appellant for a Section 15 lease for the California lands.

It must also be pointed out here that in the event the appellant does dispose of her privately owned or controlled lands in California to another person, that person will be at liberty to make application for a Section 15 lease for any of the lands involved. Whether or not a lease will be issued in connection with such an application, however, will be at the discretion of the Secretary of the Interior, or his authorized delegate. 43 CFR 4120.1. See also Bill and June Cleverly A-30530 (June 15, 1966). Furthermore, in the event a grazing lease is issued to another person for the lands in question, the matter of making range improvements thereon may be taken up with the local Bureau officials by the new lessee.

Accordingly, the decision appealed from is affirmed.

Edith Craven Knight has the right of appeal to the Secretary of the Interior in accordance with the regulation in 43 CFR 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D.C. 20240. The amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. The appellant must show wherein the decision appealed from is in error.

Edward W. Stuebing

Chief, Branch of Land Appeals
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Enclosures 2

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